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In The

Supreme Court of the United States

October Term, 1984

FRANK J. MARCONE,

Petitioner,

vs.

PENTHOUSE INTERNATIONAL, LTD.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. In a libel action in which the defendant asserts the *New York Times v. Sullivan* privilege does the defendant bear the burden of proving its allegation that the plaintiff is a public figure?

2. In a libel action in which the defendant asserts the *New York Times v. Sullivan* privilege may the public figure status of the plaintiff be established by mere hearsay newspaper reports?

3. In a libel action in which the defendant asserts the *New York Times v. Sullivan* privilege must disputed facts relevant to plaintiff's status as a public figure be decided by the jury even if the ultimate decision as to that status is for the Court?

4. Is a libel plaintiff's mere indictment for a crime for which he is not convicted sufficient to make him a limited purpose public figure?

5. Can an attorney's representation of a client render the attorney a limited purpose public figure?

6. Where the issue is whether there is sufficient evidence to warrant submission to the jury of the issue of actual malice under *New York Times v. Sullivan*, and there are conflicting inferences that can be drawn from the evidence, must the evidence be viewed in the light most favorable to the plaintiff?

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No.

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FRANK J. MARCONE,

Petitioner,

vs.

PENTHOUSE INTERNATIONAL, LTD.,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Frank J. Marcone, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 6, 1985 (timely motion for rehearing en banc denied on March 1, 1985).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 754 F.2d 1072. The opinion of the District Court for the Eastern District of Pennsylvania on post trial motions is reported at 577 F. Supp.

318, and the opinion of the district court on respondent's motion for summary judgment is reported at 533 F. Supp. 353. All these lower court opinions appear in the Appendix hereto, which is separately bound. (Citations to the opinions in the Appendix are made thus: App. 1, *etc.*)

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on February 6, 1985, and a timely petition for rehearing en banc was denied on March 1, 1985. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I.

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

STATEMENT OF THE CASE

This is a diversity jurisdiction libel action under Pennsylvania law in which the plaintiff-petitioner sought damages from the respondent, the publisher of Penthouse magazine, because of a November 1978 article entitled "The Stoning of America," in which petitioner was listed as an example of an "attorney criminal" who "contributed down payments of up to $25,000 on grass [marijuana] transactions" and against whom charges "were dismissed because he cooperated with further investigations." In its answer to the complaint the respondent alleged that petitioner was a public figure and that, therefore, it was entitled to the constitutional privilege set forth in *New York Times v. Sullivan*. On a summary judgment motion, however, the District Court

for the Eastern District of Pennsylvania determined that petitioner was a private and not a public figure and, therefore, Penthouse was not entitled to the constitutional privilege. The trial resulted in a jury verdict for petitioner in the amount of $30,000 in compensatory damages and $537,500 in punitive damages. Penthouse's post trial motions were denied by the District Court except that a remittitur of punitive damages to $200,000 was ordered by the Court and accepted by petitioner.

On appeal the Court of Appeals for the Third Circuit, after finding the article to be defamatory under Pennsylvania law, held as a matter of law that although this is a "close case," the petitioner was a limited purpose public figure (754 F.2d at 1086-87, App. 27) and that there was insufficient evidence in the record of actual malice.[1] Based on these determinations the Court of Appeals entered judgment in favor of Penthouse notwithstanding the verdict.

The sole evidence in the record on which the Court of Appeals could have based its finding that petitioner was a limited purpose figure was as follows: Petitioner, an attorney from the Philadelphia area, was indicted in Detroit for allegedly participating in drug trafficking. The indictment was "widely reported by the Philadelphia area media." Petitioner had represented various members of two motorcycle gangs, the Pagans and the Warlocks, but did not engage in any activity to bring attention "to his clients or himself." There were newspaper reports that petitioner had met at some unspecified time with one of his clients and others at the Castle, a place which was allegedly the headquarters of the motorcycle gangs and which was allegedly linked to the drug ring which was the subject of the Detroit indictment. There was

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1. Although the case was tried on the basis of plaintiff's being a private figure, the issue of actual malice was presented to the jury as related to punitive damages, resulting in a verdict for petitioner.

also a newspaper report that petitioner, at an unspecified time and place, had taken occasional weekend trips with motorcycle gang members.

On the other hand, the evidence in the record which would support a finding of actual malice is as follows: The draft of the article as submitted by the author, a free-lance writer, stated that charges against Marcone were dismissed in favor of another indictment. This statement was confirmed by a Senate Subcommittee report which Penthouse had obtained to verify the statements against Marcone. This statement, however, did not support one of the themes of the article that attorney criminals were not being severely punished for their participation in drug trafficking. Penthouse altered the article and instead of the statement made by the author, Penthouse published the statement that, "charges against him [Marcone] were dismissed because he cooperated with further investigations." The only possible support for this change in the article was a footnote in the Senate Subcommittee report which indicated that the sentence of some defendants was reduced because of cooperation. The footnote indication, however, did not appear next to Marcone's name.[2] Moreover, the footnote mentioned a reduction in the sentence of certain defendants and Penthouse had no information that Marcone had ever been sentenced for any crime and in fact, he had not been convicted or sentenced. Nevertheless, the Court of Appeals stated that it was "clear" that the footnote was misread or misinterpreted by Penthouse and was the reason why Penthouse altered the author's draft (754 F.2d at 1090, App. at 35).

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2. Contrary to the Court of Appeals' opinion (754 F.2d at 1076, App. at 4) the record does disclose why Marcone was not reindicted. It was because there was insufficient evidence. 577 F. Supp. at 329, App. at 106-7).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS INVOLVES IMPORTANT QUESTIONS WHICH HAVE NOT BEEN, BUT SHOULD, BE SETTLED BY THIS COURT CONCERNING THE ALLOCATION OF THE BURDEN OF PROVING THE PUBLIC FIGURE STATUS OF A LIBEL SUIT PETITIONER, THE QUALITY OF PROOF ADMISSIBLE TO PROVE THAT STATUS, AND THE RIGHT TO A JURY TRIAL OF DISPUTED ISSUES OF FACT RELATED TO THAT STATUS.

Based on the district court's summary judgment determination, the present case was tried on the theory that the petitioner was a private and not a public figure.[3] On appeal, however, the Court of Appeals, relying on hearsay evidence which had been admitted solely for an unrelated reason, determined as a matter of law that petitioner was a limited purpose public figure, and because the Court of Appeals also found insufficient evidence of actual malice, it entered judgment in favor of the respondent notwithstanding the verdict. Thus, there was no trial of the issue of whether the petitioner was a private or public figure. To the extent that there was insufficient evidence, the Court of Appeals

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3. On the defendant's motion for summary judgment the district court determined "that Mr. Marcone is not a public figure for the limited purposes of this action" (533 F. Supp. at 360, App. at 65-66). Although the plaintiff had filed no cross motion this determination of plaintiff's status was treated as final by the district court and both parties at trial, and no evidence was offered at trial directed to plaintiff's status. On post trial motions the issue of the plaintiff's status as a private figure was, likewise, treated as having been determined by the summary judgment motion (517 F. Supp. at 322, App. at 75). The Third Circuit also treated the issue as foreclosed prior to trial. (754 F.2d at 1077, App. at 6).

determined the issue in favor of the respondent, and to the extent that there was conflicting evidence of the facts on which the determination of petitioner's status was based, the Court of Appeals decided that conflict as a matter of law in favor of the respondent.

In none of the public figure defamation cases previously decided by this Court has there been a dispute as to the facts on which the alleged public figure status of the plaintiff was based.[4] Therefore, this Court has not as yet had the occasion to settle the important procedural questions involved here as to whether hearsay evidence is admissible to prove the public figure status of the plaintiff, which party has the burden of proof as to that status and whether there is a right to jury trial as to the disputed facts on which the determination of that status is made. These procedural questions are of broad importance since they could arise in any defamation case where it is contended that the plaintiff is a public figure, and, therefore, should be settled by this Court.

A. This Court Has Not, But Should Settle the Important Question of Whether the Defendant Has the Burden of Proving the Plaintiff to Be a Public Figure.

Although the Court of Appeals in the instant case did not explicitly place the burden on the petitioner of disproving his public figure status, a review of the Court of Appeals' analysis

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4. *Bose v. Consumers Union of U.S.*,____ U.S. ____, 104 S. Ct. 1949, 1955, ____ L. Ed. 2d ____ (1984) (petitioner did not contest public figure status); *Wolston v. Reader's Digest Assoc., Inc.*, 443 U.S. 157, 166, 99 S. Ct. 2701, 2706, 61 L. Ed. 2d 950 (1979) (undisputed facts do not justify public figure status); *Hutchinson v. Proxmire*, 443 U.S. 111, 139-36, 99 S. Ct. 2675, 2688, 61 L. Ed. 2d 411 (1979) (same); *Time, Inc. v. Firestone*, 424 U.S. 498, 453-55, 96 S. Ct. 958, 965, 47 L. Ed. 2d 154 (1976) (same); *Gertz v. Robert Welch, Inc.*, 415 U.S. 323, 325-26, 351-52, 94 S. Ct. 2997, 3000-01, 3013, 41 L. Ed. 2d 789 (1974) (same).

demonstrates that it, in fact, placed the burden on petitioner and that if the court had recognized that the burden lay on the respondent, it would have concluded that respondent had not met its burden of proof.[5] The Court of Appeals found "Marcone's non-representational contacts with the Pagans" to be crucial to its determination that Marcone was a limited purpose public figure[6] (754 F.2d at 1086, App. at 25). These so-called non-representational contacts included meetings at the Castle with Frey, Heron and Mealy and occasional weekend trips with motorcycle gang members (*ibid.*). Assuming for purposes of discussion that these contacts did in fact occur, there is insufficient evidence in the record to permit them to be used to establish the petitioner as a public figure. With regard to the meetings at the Castle with Frey, Heron and Mealy, there is no evidence whatsoever as to when the meetings occurred or whether they were of a completely private nature. Moreover, as noted by the Court of Appeals, Marcone represented Frey (754 F.2d at 1085, App. at 23), and there is no evidence that the meetings were not solely in furtherance of that representation. With regard to the weekend trips, there is absolutely no evidence when or where these trips occurred, *i.e.*, whether they occurred years before or whether they were in completely private circumstances.[7]

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5. Since respondent did not meet even the minimal burden of producing *prima facie* evidence that petitioner was a public figure, it is not necessary, for present purposes, to distinguish between the burden of producing evidence and the burden of persuasion.

6. The Court of Appeals in the present case cites no authority for its holding that a lawyer's non-representational contacts with his clients can convert him into a public figure.

7. This Court in *Wolston v. Reader's Digest Ass'n., Inc.*, 993 U.S. 157, 163, 165, 99 S. Ct. 2101, 2705, 2706, 61 L. Ed. 2d 450 (1979), indicated that with the passage of time a return of a public figure to private life was possible. *See also*, the concurring opinion of Justice Blackman, joined by Justice Marshall, 443 U.S. at 170, 99 S. Ct. at 2108. And *see* the Court of Appeals opinion in

(Cont'd)

Although this Court has indicated that the burden of proof is on the defendant to prove the public figure status of a defamation plaintiff, this Court has not settled this important issue. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352, 94 S. Ct. 2991, 3013, 41 L. Ed. 2d 789 (1974), where the plaintiff was found not to be a public figure, this Court pointed out that "respondent offered no proof" and that "absent clear evidence of general fame or notoriety" a person should not be deemed a general purpose public figure. Likewise, In *Hutchinson v. Proxmire,* 443 U.S. 111, 134-35, 99 S. Ct. 2615, 2688, 61 L. Ed. 2d 411 (1979), where it was held the plaintiff was not a public figure, this Court referred to the issue as a "defense," and pointed out that the evidence does not "demonstrate" that the plaintiff was a public figure. And, in *Wolston v. Reader's Digest Ass'n., Inc.*, 443 U.S. 151, 162-63, 99 S. Ct. 2101, 2701, 61 L. Ed. 2d 450 (1919), this Court, in holding the plaintiff not to be a public figure, stated:

> A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times.*

However, even in the face of the foregoing statements by this Court, prominent commentators have treated the burden of proof issue as an open one. Thus, in *Restatement, Torts* 2d §580A, comment *c,* at p. 211 (1977), it is stated:

> where the burden of proof lies . . . has not been settled.

(Cont'd)

the instant case (574 F.2d at 1087 n.10, App. at 27 n.10) where the Court notes "that theoretically the passage of time might permit a public figure to regain private status, but such was not the case here."

And in *Prosser & Keeton on Torts* 806 (1984) it is stated:

> probably the burden of proof will be on the defendant to show such facts as necessary to establish the favored category.

Of course, placing the burden on the defendant of proving the public figure status of the plaintiff would be consistent with the rule that the burden is on the defendant of proving "the presence of circumstances necessary for the existence of a privilege to publish the defamatory communication," *Restatement, Torts* 2d §613(2) (1917). And then the burden would fall on the plaintiff of proving abuse of the privilege, *i.e.*, actual malice.

B. This Court Has Not, But Should, Settle the Important Question of Whether a Libel Plaintiff's Status as a Public Figure Can Be Established by Mere Hearsay.

In the present case the crucial evidence relied upon by the Court of Appeals as establishing plaintiff-petitioner's status as a public figure consisted solely of hearsay[8] reports from news papers concerning "non-representational contacts" between petitioner and his clients. Thus, the Court of Appeals held:

> More important for the limited public figure determination are Marcone's non-representational contacts with the Pagans. As noted, Marcone *reportedly* met at the Pagans' headquarters with Frey, Heron and Mealy. In addition, *one newspaper article reported* that Marcone admitted to going on occasional weekend trips with motorcycle gang members.

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8. The trial judge recognized the newspaper articles as hearsay, but admitted them for the sole purpose of mitigating damages by showing petitioner's pre-publication reputation (N.T. 4.77: Charge of the Court 47).

* * *

> In this regard, Marcone's non-representational connections to the Castle and the Pagans are sufficient to tip the balance in the calculation.

(754 F.2d at 1086, App. at 25-26). (Emphasis added.)

This Court has never ruled on the question of whether the plaintiff's status as a public figure may be established by hearsay reports as in the present case. However, in the public figure cases decided by this Court the question has always appeared to be whether the plaintiff was actually a public figure rather than whether he or she was merely reputed to be a public figure. *See, e.g., Wolston v. Reader's Digest Ass'n, Inc.,* 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979); *Hutchinson v. Proxmire,* 443 U.S. 111, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979); *Time, Inc. v. Firestone,* 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). Moreover, requiring non-hearsay proof that the plaintiff was actually a public figure is consistent with this Court's analysis of the public figure defense as being based, not on the defendant's view of the plaintiff, but rather on the plaintiff's having voluntarily placed himself in a position where he is in the public eye. In *Gertz, supra,* 418 U.S. at 351, 94 S. Ct. at 3009, this Court defined the status of public figure as follows:

> For the most part those who attain this status *have assumed* roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures *have thrust themselves* to the forefront of particular public controversies in order to influence the

> resolution of the issues involved. In either event, *they invite attention and comment.* (Emphasis added.)

See also, to the same effect, *Hutchinson, supra,* 443 U.S. at 134, 99 S. Ct. at 2687-88. And *see Time, Inc. v. Firestone, supra,* 424 U.S. at 454-55, 96 S. Ct. at 965 where this Court, in finding the plaintiff not to be a public figure, held:

> Nor did respondent *freely choose* to publicize issues as to the propriety of her married life. She was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony. We have said that in such an instance '[r]esort to the judicial process . . . is no more *voluntary* in a realistic sense than that of the defendant called upon to defend his interests in court.' (Emphasis added).

C. This Court Has Not, But Should, Settle the Important Question of Whether There Is a Right to Jury Trial of Disputed Issues of Fact Related to Plaintiff's Status as a Public Figure.

In the present case the Court of Appeals made its own independent findings as to the facts, and then based on those findings determined that the petitioner was a limited purpose public figure. (957 F.2d at 1084-87, App. at 22-27). For example, newspaper articles on which the Court of Appeals relied stated that petitioner had meetings at the Castle. On the other hand, petitioner expressly denied having any connection with the Castle (N.T. 4.66). The Court of Appeals resolved this factual dispute by finding that petitioner had, in fact, met at the Castle (757 F.2d at 1086-87, App. at 25-27).

This Court has never ruled on the important question of whether there is a right to jury trial as to disputed subsidiary facts

on which the ultimate determination of the plaintiff's public figure status is based, even though the ultimate determination of the plaintiff's status may be for the Court. This question could arise in every defamation action where the status of the plaintiff is an issue.

On the closely related question of whether a libel plaintiff was a public official, this Court in *Rosenblatt v. Baer,* 383 U.S. 75, 88, 86 S. Ct. 669, 677, 15 L. Ed. 2d 597 (1966), stated:

> We remark only that, as is the case with questions of privilege generally it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official.'[15]

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15. 1 Harper & James, Torts §5.29 (1956); Prosser, Torts §110, p. 823 (3d ed. 1964); Restatement, Torts §619.

Each of the three authorities cited by this Court in *Rosenblatt* set forth the same division of function between judge and jury with regard to privilege, *i.e.,* whether a privileged occasion exists is determined by the court, but if the facts are in dispute, their determination is for the jury.

II.

THE COURT OF APPEALS HAS HELD PLAINTIFF-PETITIONER TO BE A LIMITED PURPOSE PUBLIC FIGURE BASED ON AN ANALYSIS WHICH IS INCONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT.

A. The Court of Appeals, Inconsistent with Applicable Decisions of this Court, Held that the Indictment of the Plaintiff-Petitioner for a Crime of Which He Was Never Convicted Amounted to an Involvement in a Public Controversy Militating in Favor of His Being Held to be a Limited Purpose Public Figure.

The Court of Appeals, consistent with this Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352, 94 S. Ct. 2997, 3013, 41 L.Ed.2d 789 (1974), correctly started its analysis of the question of whether plaintiff-petitioner was a limited purpose public figure by holding:

> To determine whether Marcone was a limited purpose public figure with regard to his alleged involvement in the purchase and sale of illicit drugs, we must consider (1) whether drug trafficking is a 'public controversy' and (2) the 'nature and extent' of Marcone's participation in this controversy.

754 F.2d at 1082, App. at 18. However, the Court of Appeals then departs drastically from the applicable decisions of this Court.

(1) The Court of Appeals Erroneously Defined Public Controversy Inconsistently With the Applicable Decisions of this Court.

The Court of Appeals held that —

> Drug trafficking of such mammoth proportions, which is one of the most troubling issues of our time, surely falls within the ambit of public controversy.

754 F.2d at 1083, App. at 19. This analysis of what constitutes a public controversy is in direct conflict with this Court's decision in *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 166 n.8, 99 S. Ct. 2701, 2701 n.8, 61 L.Ed.2d 450 (1979), where the Court concluded that the plaintiff, who had been listed by the defendant as a Soviet spy, was not a public figure, holding:

> Certainly, there was no public controversy or debate in 1958 about the desirability of permitting Soviet espionage in the United States; all responsible United States citizens understandably were and are opposed to it.

See also, to the same effect *Hutchinson v. Proxmire,* 443 U.S. 111, 135, 99 S. Ct. 2675, 2688, 61 L. Ed. 2d 411 (1979).

The Court of Appeals, however, flouted the authority of this Court by intentionally deciding the point in direct conflict with this Court's decision in *Wolston.* This is demonstrated by footnote 8 of the Court of Appeals opinion in which the Court states:

> We reject the notion that merely because most people would agree that drug trafficking is undesirable, there is no 'controversy' regarding the matter.

754 F.2d at 1083 n.8, App. 19 n.8. This statement is then followed by the citation of *Wolston* with the signal "*see*" and the citation of a law review article[9] in which the author, on the pages cited

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9. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel,* 132 U. of Pa. L. Rev. 1, 56-57 (1983).

by the Court of Appeals, characterizes this Court's analysis in *Wolston* as "myopic," "facially spurious," "ludicrous," "hypertechnical" and "flawed."

(2) The Court of Appeals, Inconsistent with the Applicable Decisions of this Court, Equated Plaintiff-Petitioner's Indictment on Drug Charges with Voluntary Participation by Him in Drug Trafficking.

After discussing plaintiff-petitioner's indictment on drug charges, the Court of Appeals equated petitioner's indictment with actual voluntary participation in criminal activity, holding:

> Although the criminal activity, by itself, may not create public figure status, such activity may, nevertheless, be one element in a mix of factors leading to that classification. Moreover, the crime involved in *Wolston* was particularly passive — a contempt citation for failure to appear at a grand jury hearing because of ill health. In the present case, however, Marcone was indicted for participating, not in a passive manner, in a drug conspiracy. This factor may be considered in our analysis of Marcone's status.

754 F.2d at 1085, App. at 24. This use by the Court of Appeals of plaintiff-petitioner's indictment on drug charges as evidence that he, in fact, was involved in drug trafficking and had, thus, thrust himself into a public controversy is inconsistent with applicable decisions of this Court. In *Time, Inc. v. Firestone,* 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976), this Court held:

> '[r]esort to the judicial process . . . is no more voluntary in a realistic sense than that of the

> defendant called upon to defend his interest in court.'

424 U.S. at 454, 96 S. Ct. at 965.

> And while participants in some litigation may be legitimate 'public figures,' either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others.

424 U.S. at 457, 96 S. Ct. at 966-67. And in *Wolston v. Reader's Digest, Ass'n., Inc.*, 443 U.S. 157, 167, 99 S. Ct. 2701, 2707, 61 L. Ed. 2d 450 (1979), this Court held:

> A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.

B. The Court of Appeals, Inconsistent with Applicable Decisions of this Court, Held that the Conduct of the Plaintiff-Petitioner as an Attorney in Connection with His Clients Rendered Him a Limited Purpose Public Figure

After stating that "[n]othing in the record of the present case indicates that Marcone was engaged in bringing attention to his clients or himself in regard to their legal relationship," the Court of Appeals holds that it "may give only limited significance to Marcone's representational activities in the public figure analysis." 754 F.2d at 1086, App. at 25. In attributing any significance whatsoever to the petitioner's representation of his clients, no

matter how notorious or controversial the clients, the Court of Appeals' decision conflicts with this Court's holding in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), that an attorney's representation of a client does not make the attorney a public figure. *See also, Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 167, 99 S. Ct. 2701, 2707, 61 L. Ed. 2d 450 (1979), where this Court described *Gertz* as holding —

> that an attorney was not a public figure even though he associated himself with a case that was certain to receive extensive media coverage.

And as is pointed out by Mr. Justice Blackmun in his concurring opinion in *Gertz*, "the advocate is not to be invidiously identified with his client" since to do so would "gravely jeopardize" the right to counsel. *Gertz, supra*, 418 U.S. at 355, 94 S. Ct. at 3014.

III.

THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS IN OTHER CIRCUITS AS TO THE METHOD OF RESOLVING CONFLICTING INFERENCES FROM THE EVIDENCE ON THE ISSUE OF ACTUAL MALICE.

The Penthouse article involved in the present case was written by Edward Rasen, a free-lance writer. The only existing drafts of the article state:

> Frank Marcone, an attorney from the Philadelphia area, contributed down payments of up to $25,000 towards shipments. Charges were dismissed in favor of another indictment.

However, the article as published by Penthouse stated:

> Frank Marcone, an attorney from the Philadelphia area, contributed down payments of up to $25,000 on grass transactions. Charges against him were dismissed because he cooperated with further investigations.[10]

There was no evidence as to why the article as published contained the statement that charges against Marcone were dismissed because he cooperated with further investigations. Indeed, before the article had been published, Penthouse had in its possession a Senate Subcommittee report indicating that an

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10. In addition to indicating petitioner's guilt of the crime, this statement could also be found to be defamatory on the ground that it could be interpreted as meaning that Marcone had cooperated by disclosing privileged information he received from clients.

indictment was dismissed against Marcone and that he was to be reindicted in Philadelphia.[11] This report stated in a footnote that the sentence of certain persons other than Marcone had been reduced because of their cooperation with the authorities. The other two sources upon which Penthouse had to rely in publishing the defamatory statements about Marcone were the author's notes and an article in *The Philadelphia Inquirer*. The author's notes were not produced by respondent at trial, and the editor of the article had no recollection as to what the notes contained concerning Marcone. The *Inquirer* article referred to the indictment against Marcone, but did not state that Marcone had actually committed the crime and did not say that he had cooperated with further investigations.

At trial, Penthouse argued that the footnote in the Senate Subcommittee report could have been misinterpreted by someone at Penthouse to mean that Marcone cooperated with the government. In answer to special interrogatories, however, the jury expressly found that Penthouse published false and defamatory statements about Marcone either with knowledge of their falsity or with reckless disregard as to whether they were true or false. Thus, the jury rejected Penthouse's argument. Nevertheless, the Court of Appeals overturned the jury's finding, and adopted respondent's argument, holding that "the source of the mistaken alteration is clear. * * * Someone at the magazine apparently misread the footnote as also referring to . . . Marcone." 754 F.2d at 1090, App. at 35-36.

By accepting Penthouse's argument, which had been rejected by the jury, and on that basis entering judgment notwithstanding the verdict, the Court of Appeals, in effect, viewed the evidence

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11. Petitioner was, in fact, never reindicted and no further criminal proceedings were brought against him because of a lack of evidence. (577 F. Supp. at 329, App. at 106-7).

in the light most favorable to the respondent.[12] In this regard the Court of Appeals' decision is in direct conflict with the decisions of the Courts of Appeals of other Circuits on the same issue.

The Court of Appeals for the District of Columbia Circuit in *Tavoulareas v. The Washington Post Company,* 83-1605 (U.S. Court of Appeals, D.C. Cir. April 9, 1985) (Pet. for Reh. pending), reversed the District Court's Order entering judgment for the defendant notwithstanding the verdict, and in so doing held:

> Our review commands only that we evaluate the inferences most favorable to the plaintiff, examine them for their reasonableness, and determine whether they support a finding that the plaintiffs have clearly and convincingly demonstrated actual malice.

Slip opinion at 79.

The Court of Appeals for the Ninth Circuit in *Alioto v. Cowles Communications, Inc.,* 519 F.2d 777, 780 (9th Cir.), *cert. denied,* 423 U.S. 930, 96 S. Ct. 280, 46 L. Ed. 2d 259 (1975), likewise, held that an appellate review to determine the adequacy of the evidence of actual malice in a public official libel case must draw all permissible inferences in the plaintiff's favor and resolve all questions of credibility in his behalf. *See also,* to the same effect, *Guam Federation of Teachers, Local 1581 v. Ysrael,* 492 F.2d 438 (9th Cir.), *cert. denied,* 419 U.S. 872, 95 S. Ct. 132, 42 L. Ed. 2d 111 (1974).

---

12. Petitioner, by no means, concedes that it is a fair inference from the record that the foonote in the Senate report was, in fact, misread as argued by Penthouse. But for present purposes, it is sufficient to accept the proposition that it is reasonable to view the report either way.

This Court should, therefore, grant certiorari to resolve this conflict among the Circuits as to the method of resolving conflicting inferences during an appellate review of the record to determine the adequacy of the evidence of actual malice in a public official or public figure libel case.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1984

FRANK J. MARCONE,

Petitioner,

vs.

PENTHOUSE INTERNATIONAL, LTD.,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-1004

MARCONE, FRANK J.,

Appellee

v.

PENTHOUSE INTERNATIONAL MAGAZINE FOR MEN
and
PENTHOUSE INTERNATIONAL LTD.
and
MEREDITH PRINTING CORP.
and
CURTIS CIRCULATION COMPANY
and
RASEN, EDWARD

PENTHOUSE INTERNATIONAL, LTD.,

Appellant

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
C.A. No. 78-3733

Argued July 20, 1984

Before: ADAMS, HIGGINBOTHAM,
and VAN DUSEN, *Circuit Judges*

(Filed February 6, 1985)

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OPINION OF THE COURT

ADAMS, *Circuit Judge.*

Once again this Court is called upon to chart the proper course between the Scylla of inadequately guaranteeing First Amendment protections and the Charybdis of diminishing an individual's right to reputation. Plaintiff Frank Marcone brought suit for libel against Penthouse, the International Magazine for Men and Penthouse International, Ltd. (collectively Penthouse). The district judge determined that Marcone was not a public figure and therefore charged the jury that it could award him compensatory damages upon a showing that the publisher was negligent. The jury awarded Marcone compensatory as well as punitive damages. Because the district judge erred in not classifying Marcone as a limited purpose public figure and because plaintiff failed to prove that the libelous statement was made with actual malice.

the standard prescribed in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), we will reverse.

I.

Marcone is an attorney residing in Delaware County, a suburb of Philadelphia. During the mid-1970's he gained notoriety in part through his representation of the Pagans, a motorcycle gang headquartered in Marcus Hook, Pennsylvania, and a rival gang, the Warlocks. Marcone was also linked to these motorcycle gangs on a non-professional basis. In this regard, law enforcement agents stated that Marcone frequented "the Castle," a 40-room mansion in Delaware County which served as the Pagans' headquarters. Among other things, the Castle was connected with the disappearance and death of five young women in 1976. An article in the *Philadelphia Inquirer* dated March 18, 1976, reported that Marcone once stated that he "occasionally went on weekend trips" with one of the motorcycle gangs. App. at 198a(5).

In February of 1976, a grand jury in Detroit, Michigan, handed down an indictment charging Marcone and 24 other co-defendants with conspiring "to knowingly, intentionally and unlawfully possess with intent to distribute, and to distribute marijuana" in violation of 21 U.S.C. §§ 841(a)(1), 846 (1982). In particular, the indictment charged that "[d]uring May, 1974, FRANK MARCONE gave $25,000 in United States currency to FREDERICK R. FREY in Philadelphia, Pennsylvania for the purpose of purchasing multi-hundred pound quantities of marijuana in California." Law enforcement agents stated that Marcone and the three other co-defendants from the Philadelphia area had frequent meetings at the Castle.

On May 19, 1976, the government withdrew the charges against Marcone without prejudice to his

being reindicted in Philadelphia. An assistant United States Attorney in Detroit explained that the charges were dropped because of "legal technicalities" in tying Marcone to the larger conspiracy which involved defendants from San Diego to Montreal. For reasons not explained in the record, Marcone was not subsequently reindicted in Philadelphia.

Penthouse published an article in its November 1978 issue entitled "The Stoning of America." Written by Edward Rasen, the article concerned the emergence of marijuana trade as a multibillion dollar industry. The subtitle stated that "marijuana is now big agribusiness -- a $12 billion a year corporate growth crop." The article proceeded to report, in part, about "criminal attorneys and attorney criminals" involved in drug transactions:

> [T]he typical new dope businessman is an attorney. "We have criminal attorneys and attorney criminals," says Fred Rody, Miami DEA regional director. "There is such a thing as criminal consort. We know that some of the large smuggling operations have lawyers who are providing them with all the advice they need to operate."
>
> However, even after DEA agents spent more than two years building an airtight case against a Mexican-American syndicate involved in the multi-million-dollar, nationwide wholesaling of marijuana, federal judges did not sentence any of the attorney criminals to prison.
>
> Examples: Richard J. Litner, a practicing attorney in Boston, financed sales in New England and set up "cover" corporations, yet was offered the opportunity by federal judge Charles W. Joiner, without the consent of the prosecutor, to plead guilty to reduced charges. He was then placed on one-year probation so that he would not be

disbarred and deprived of his livelihood. Attorney John K. Lowe. of Denver and Kansas City. made a hand-to-hand sale of 400 pounds of marijuana to an undercover agent for $40.000. He received two years' probation and a $1.000 fine. As a law student. George Weingarten. now a practicing attorney in San Diego. once received a gold Rolex wristwatch as a sales reward for distributing 10.000 pounds of marijuana in one week. He became a DEA informant in exchange for a reduced sentence of one-year probation. Maria Blanca-Vargas Reid. executive director of the San Diego Mental Health Association. handled a $35.000 drug payment. Charges were dismissed in the interest of justice after she cooperated with federal authorities and revealed the whereabouts of her son. Robert Craig Chipman. and his criminal associates. *Frank Marcone. an attorney from the Philadelphia area. contributed down payments of up to $25.000 on grass transactions. Charges against him were dismissed because he cooperated with further investigations.* Charles Sargent Hewett. a law student from Corona Del Mar. Calif.. wholesaled up to $750.000 of marijuana per week. Charges were dismissed at the request of the U.S. attorney's office for his cooperation in identifying all the people he sold to. even though he was involved in the murder of his former distributor in Boston and the attempted murder of one of his associates from San Francisco. And so on.

App. at 21a (emphasis added).

Marcone brought suit against Penthouse charging that the article libeled him since it declared that he was guilty of an offense for which he was only indicted. and since it stated that charges were dropped against him because he cooperated with the authorities. Plaintiff

alleges that these two statements are untrue and that they have caused him harm and subjected him to ridicule.

Penthouse moved for summary judgment on six grounds, including that Marcone was a public figure and was unable to make the showing of actual malice required by *New York Times* and its progeny. The district court denied the motion. *Marcone v. Penthouse International, Ltd.*, 533 F. Supp. 353 (E.D. Pa. 1982), and the case proceeded to trial.

Shortly before trial, the district judge ruled that the article was libelous per se; that Marcone was not a public figure; and that Pennsylvania would adopt a negligence standard for private figures regardless of whether the article involved matters of public concern. The case was tried before a jury which returned a verdict for Marcone of $30,000 actual damages and $537,000 punitive damages. The district judge rejected Penthouse's post trial motions for judgment n.o.v. or a new trial, but ordered a remittitur reducing the punitive damages to $200,000 because he found the jury's award to be "so grossly excessive as to shock the conscience of the Court." *Marcone v. Penthouse International, Ltd.*, 577 F. Supp. 318, 335 (E.D. Pa. 1983). Marcone accepted the remittitur on December 20, 1983, and Penthouse appealed from the final judgment, which as modified consists of $30,000 in actual damages and $200,000 in punitive damages.

II.

Although replete with First Amendment implications, a defamation suit fundamentally is a state cause of action. The parties here agree that Pennsylvania law applies. Inasmuch as Marcone is a Pennsylvania resident and any harm to his reputation that may have occurred centered in that state, the

district court was correct to apply Pennsylvania law. *See Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 269-70 (3d Cir. 1980); *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495, 501-02 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978).

An adjudication of a defamation case involves both state and federal law inquiries. A court must determine: "(1) whether the defendants have harmed the plaintiff's reputation within the meaning of state law; and (2) if so, whether the First Amendment nevertheless precludes recovery." *Steaks Unlimited*, 623 F.2d at 270.

Thus our initial inquiry is whether plaintiff has made a proper claim under state law. To recover in a libel action under Pennsylvania law, plaintiff has the burden of proving, when properly raised:

(1) The defamatory character of the communication.

(2) Its publication by the defendant.

(3) Its application to the plaintiff.

(4) The understanding by the recipient of its defamatory meaning.

(5) The understanding by the recipient of it as intended to be applied to the plaintiff.

(6) Special harm resulting to the plaintiff from its publication.

(7) Abuse of a conditionally privileged occasion.

42 Pa. Cons. Stat. § 8343(a) (1982); *see also Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899 (1971); *Agriss v. Roadway Express, Inc.*, 483 A.2d 456 (Pa. Super. 1984). Penthouse challenges Marcone's claim on several of these grounds.

A.

First, defendant contends that plaintiff has not met the burden of proving the article's defamatory character. This is so, Penthouse maintains, because the questioned remarks are incapable of defamatory meaning. Whether a statement is capable of defamatory meaning is a question the judge, as distinguished from the jury, must determine, *see Franklin Music Co. v. American Broadcasting Cos., Inc.*, 616 F.2d 528, 540 (3d Cir. 1979); *Corabi*, 441 Pa. at 442, 273 A.2d at 904 (1971), and the district court ruled that the article was capable of a defamatory meaning.

According to Pennsylvania law, a statement is defamatory if it "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Corabi*, 441 Pa. at 442, 273 A.2d at 904 (*quoting Cosgrove Studio and Camera Shop, Inc. v. Pane*, 408 Pa. 314, 318, 182 A.2d 751, 753 (1962)). The threshold determination of whether a statement is capable of defamatory meaning depends "on the general tendency of the words to have such an effect"; no demonstration of any actual harm to reputation is necessary. *Agriss*, 483 A.2d at 461.

Penthouse attempts to demonstrate that each individual phrase in the article, in isolation, cannot be understood as libelous. Thus, for example, it asserts that "cooperated with further investigations" cannot be defamatory. The proper test, however, requires that the allegedly libelous communication be read as a whole, in context. *Corabi*, 273 A.2d at 906; 441 Pa. at 444; *Agriss*, 483 A.2d at 461.

As the district court observed, "The Stoning of America" refers to "attorney criminals" and lists as one of the examples:

Frank Marcone, an attorney from the Philadelphia

> area, contributed down payments of up to $25,000 on grass transactions. Charges against him were dismissed because he cooperated with further investigations.

This statement clearly suggests that Marcone has committed a crime. Statements imputing the commission of an indictable offense are capable of defamatory meaning as a matter of law. *See Baird v. Dunn & Bradstreet*, 446 Pa. 266, 274, 285 A.2d 166, 171 (1971); *see also Agriss*, 483 A.2d at 470. Thus Penthouse's argument that the article could not possibly have defamed Marcone is not valid.

B.

Defendants next argue that even if its article was capable of being defamatory, Marcone's reputation in the community was so tarnished before the publication that no further harm could have occurred. Penthouse's assertion is that Marcone was, in effect, libel proof before the publication of the allegedly libelous statement. *See Cardillo v. Doubleday & Co.*, 518 F.2d 638, 639-40 (2d Cir. 1975); *Sharon v. Time, Inc.*, 575 F. Supp. 1162, 1168-72 (S.D.N.Y. 1983); *Wynberg v. National Enquirer, Inc.*, 564 F. Supp. 924, 927-28 (C.D. Cal. 1982).

In *Wynberg*, for example, the court held that a plaintiff, who had had a brief but highly publicized romance with Elizabeth Taylor was libel proof. 564 F. Supp. at 928. Wynberg had been convicted of criminal conduct on five separate occasions, including a conviction for contributing to the delinquency of minors. The court concluded that

> When, for example, an individual engages in conspicuously anti-social or even criminal behavior, which is widely reported to the public, his reputation diminishes proportionately,

> Depending upon the nature of the conduct. the number of offenses. and the degree and range of publicity received. there comes a time when the individual's reputation for specific conduct. or his general reputation for honesty and fair dealing is sufficiently low in the public's estimation that he can recover only nominal damages for subsequent defamatory statements.

Id.

To bolster its claim that Marcone is entitled only to nominal damages. Penthouse cites a string of items of negative publicity regarding Marcone. from 1976 onward. For example. his indictment in connection with drug trafficking in 1976 was widely publicized in the Philadelphia-area media. Moreover. a number of newspaper articles linked Marcone to the Castle. a gathering place for motorcycle gangs and a haven for a variety of illegal activities. In addition. Marcone was tried for criminal income tax evasion in 1978. and although the case ended in a hung jury. it was widely reported by the local media. Marcone was also fined at least twice for contempt of court for his failure to appear at scheduled hearings. The second of these contempt convictions occurred in 1979. however. after the Penthouse article was published. Finally. in 1978 Marcone was fined for punching a police officer who had stopped Marcone's car for a traffic violation.

While such evidence suggests that Marcone's reputation was sullied before the article was published. we cannot say as a matter of law that Marcone was libel proof. *See Buckley v. Littel.* 539 F.2d 882. 889 (2d Cir. 1976) (libel proof doctrine is narrow). *cert. denied.* 429 U.S. 1062 (1977); *Sharon v. Time.* 575 F. Supp. at 1169. Evidence of a tarnished reputation is admissible and should be considered as a factor to mitigate the level of compensatory damages. *Corabi.* 273 A.2d at 920. In the present case. the jury was informed of the evidence

regarding Marcone's reputation, and its verdict for compensatory damages may well reflect the diminished status of Marcone in November of 1978.

C.

Penthouse insists that Marcone's suit must be dismissed because he failed to prove any actual economic harm. This argument has both constitutional as well as state law dimensions.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974), the Supreme Court placed a number of limitations on state tort actions for defamation. One restriction was that plaintiffs may recover compensation for "actual injury" but not presumed or punitive damages unless the heightened *New York Times* actual malice standard is used. The Court defined actual injury as

> not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

Gertz, 418 U.S. at 350. Thus proof of actual *economic* loss is not required to recover compensatory damages as a matter of federal constitutional law.

Penthouse's assertion regarding the significance of Marcone's failure to prove "special damages" is also not in conflict with Pennsylvania law. The district court held that the article constituted libel per se and thus proof of special damages was not required. 533 F. Supp. at 361.

In a recent decision, the Superior Court of Pennsylvania has elucidated the arcane yet still utilized terms libel and slander per se and libel and slander per quod.[1] *See Agriss v. Roadway Express, Inc.*, 483 A.2d 456, 468-74 (Pa. Super. 1984). In *Agriss*, the Superior Court reasserted the traditional rule under

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1. At common law, a plaintiff could not recover for slander, *i.e.*, oral defamation, without proof that the utterance caused him "special" harm -- "harm of a material and generally of a pecuniary nature." *Agriss*, 483 A.2d at 469 (quoting Restatement of Torts § 575, Comment b (1938)). Mere loss of reputation was not sufficient to permit recovery. Eventually several exceptions were carved out of this general rule for slanders that were deemed to be so naturally injurious that actual injury was presumed. Thus statements imputing crime, loathsome disease, or shortcomings affecting a plaintiff's business, among others, were deemed slander per se. *See* W. Prosser, *Handbook of the Law of Torts* § 112, at 754 (4h ed. 1971); 3 W. Blackstone, *Commentaries* *123-24. The terms per se and per quod became pleading devices in slander cases to indicate whether the plaintiff had to prove general or special damages. *See Agriss*, 483 A.2d at 470.

   The per se/per quod distinction in libel had a different origin. Written statements that were defamatory on their face were deemed libel per se. Statements that were not defamatory in meaning on their face but required proof of "facts and circumstances imparting a defamatory meaning" were termed libel per quod. *Id.* But once libel was proved -- either per se or per quod -- it was actionable without proof of special damages. The law presumed harm when a libel occurred, because of the "greater permanency, dissemination, and credence" attached to printed as opposed to spoken words. *Id.*

   Inevitably the two uses of per se/per quod became intermingled, and libelous statements falling under the slander per se categories, such as imputation of crime, were considered actionable without proof of special damages even if the libel were per quod -- *i.e.*, required extrinsic facts to prove libelous character. *See* Prosser, *Libel per Quod*, 46 Va. L. Rev. 839 (1960).

Pennsylvania law that a plaintiff may recover in a libel suit without proving special damages. *Id.* at 474. Thus Marcone need not have established any actual pecuniary harm.[2] Under Pennsylvania law Marcone was entitled to recover for injury to his reputation as well as for personal humiliation and mental anguish as long as he presented competent evidence of such harm. *Corabi*, 273 A.2d at 919-20; *Montgomery v. Dennison*, 363 Pa. 255, 267-68, 69 A.2d 520, 527 (1949).

Marcone testified that he was "frustrated, distraught, upset, and distressed about the article and its effect on his family and friends, in that it revived the charges which he thought had been laid to rest two years previously." *Marcone*, 577 F. Supp. at 333. He also stated that he feared "retribution against his family by clients who imagined themselves the victims of his alleged cooperation" with the government. *Id.* While Marcone's testimony contained some inconsistencies, it was possible for the jury to assess his credibility and determine whether he actually suffered any harm. Consequently, the evidence of harm to reputation and mental anguish, while not overwhelming, was sufficient under Pennsylvania law to permit recovery for Marcone's "actual damages" as defined in *Gertz*.

III.

Penthouse next argues that because Marcone was a public figure the district court erred in applying a negligence rather than an actual malice standard to prove liability for actual damages. The Supreme Court has mandated that in order for public officials or public figures to recover damages in a defamation case, they must prove that the statement was published with

2. Thus the district judge's ruling that the article was libel pe se means only that it was libelous on its face; this classification has no bearing on whether special damages had to be proven.

"actual malice." *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

A.

Prior to 1964, the law of defamation was not viewed as falling within the abmit of the First Amendment, and thus was primarily left to state law. Emphasizing the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open," the Supreme Court, in the landmark decision of *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), extended First Amendment coverage to defamation concerning the conduct of public officials. The Court granted First Amendment protection to negligently false statements in order to afford the media the "breathing space" necessary to avoid a chilling effect on constitutionally valuable speech, a matter of critical importance to our democratic system. *Id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).[3] Therefore the Court required public officials who sue for defamation to prove that an allegedly defamatory statement was made with "'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80.

Three years later, the Supreme Court extended the actual malice standard for public officials to "public figures" in the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130 (1967). Together, these opinions attempted to strike a proper balance between the First Amendment concerns for open debate on public issues and the need

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3. Almost two hundred years ago, James Madison recognized that "[s]ome degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press." 4 J. Elliot, *Debates on the Federal Constitution of 1787*, at 571 (1876).

of an individual to protect his reputation. *See also Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971), a plurality opinion of a fragmented Supreme Court extended the *New York Times* actual malice standard to all "matters of public or general concern." This zenith of First Amendment protection proved transitory, however, and after three years the Court rejected *Rosenbloom's* issue-oriented approach to defamation cases. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Instead, the Court focused on the private or public status of the plaintiff as the determinative factor in striking the proper balance between individual reputation, freedom of the press, and robust public debate. The actual malice standard still governed for public officials and public figures, but not for private figures. *Id.* at 347.

Gertz justified the distinction between public and private figures on two grounds. First, public officials and public figures have "greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* at 344. Because private individuals have less access to effective self help, such individuals are more vulnerable to injury and the state has a correspondingly greater interest in protecting them.

More importantly, the Court in *Gertz* stated that individuals who seek public office or who are public figures have assumed the risk that in the course of reporting and commenting on a well known person or public controversy, the press may inadvertently make erroneous statements about them. Thus those individuals are less deserving of protection. *See id.* at 344-45; *see also Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 164 (1979).

In considering a defamation case after *Gertz*, a court is required to ascertain in the first instance whether the plaintiff is a public figure.[4] Public officials and public figures must prove actual malice. Regarding private figures, however, the Court held that states could define the appropriate standard for liability, "so long as they do not impose liability without fault." *Gertz*, 418 U.S. at 347.

The Supreme Court has not provided a detailed chart of the contours of the public and private figure categories. In an attempt to avoid "unpredictable results and uncertain expectations," the Court elected to paint with a broad brush rather than to adopt a case by case approach. *Gertz*, 418 U.S. at 343-44. Without a precise diagram for guidance, courts and commentators have had considerable difficulty in determining the proper scope of the public figure doctrine.[5] One district court opined that the task of demarcating between public and private figures "is much like trying to nail a jelly fish to the wall." *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp.

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4. The classification of a plaintiff as a public or private figure is a question of law to be determined initially by the trial court and then carefully scrutinized by an appellate court. *See, e.g.*, Rebozo v. Washington Post Co., 637 F.2d 375, 379 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981); Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1293 n.12 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980); *see also* Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Avins v. White, 627 F.2d 637 (3d Cir.), *cert. denied*, 449 U.S. 982 (1980).

5. *See, e.g.*, Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980); Harris v. Tomczak, 94 F.R.D. 687 (E.D. Cal. 1982); Ashdown, *Of Public Figures and Public Interest -- The Libel Law Conundrum*, 25 Wm. & Mary L. Rev. 937 (1984); Daniels, *Public Figures Revisited*, 25 Wm. & Mary L. Rev. 957 (1984); Schauer, *Public Figures*, 25 Wm. & Mary L. Rev. 905 (1984).

440, 443 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978).

In *Gertz*, the Court described two classes of public figures: all purpose public figures and limited purpose public figures. Some individuals "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." 418 U.S. at 345. The Court further stated that such a person achieves "such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." *Id.* at 351.[6]

More common are individuals deemed public figures only in the context of a particular public dispute. These limited purpose public figures become involved in particular public controversies. *Id.* at 345. As the Court explained, a limited purpose public figure is "an individual [who] voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* at 351.

B.

Penthouse does not contend and we cannot hold that Marcone developed such pervasive notoriety in the community that he should be deemed a public figure for all purposes. *See Gertz*, 418 U.S. at 352 ("Absent clear evidence of general fame or notoriety .... It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."). Rather,

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6. For attempts at fuller exposition of this category see, for example, *Waldbaum*, 627 F.2d at 1294-95; *Tomczak*, 94 F.R.D. at 700-03. One commentator has recently advocated eliminating this category. *See* Note, *General Public Figures Since* Gertz v. Robert Welch, Inc., 58 St. John's L. Rev. 355 (1984).

the defendant maintains that the trial judge erred in not classifying Marcone as a public figure in the limited circumstance of his connection with illicit drug activities. To determine whether Marcone was a limited purpose public figure with regard to his alleged involvement in the purchase and sale of illicit drugs, we must consider (1) whether drug trafficking is a "public controversy" and (2) the "nature and extent" of Marcone's participation in this controversy. *See id.*; *Avins v. White*, 627 F.2d 637, 647 (3d Cir.), *cert. denied*, 449 U.S. 982 (1980).

In *Time, Inc. v. Firestone*, 424 U.S. 448, 458 (1976), the Supreme Court rejected the equation of "public controversy" with all disputes of interest to the public. Although the Firestones' marital difficulties were the subject of extensive media coverage and public interest, the Court characterized the matter as private in nature. Mere newsworthiness, it stated, is not sufficient to create a *public* controversy. *See Wolston v. Readers Digest*, 443 U.S. at 167-68. In *Avins v. White*, 627 F.2d at 647, we cited with approval the District of Columbia Circuit's definition that a public controversy "must be a real dispute, the outcome of which affects the general public or some segment of it." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980). To be "public," the dispute must affect more than its immediate participants.[7]

Employing this definition, it is clear that the present case involves a public controversy. The challenged statement asserts that Marcone purchased $25,000 worth of marijuana as part of a drug

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7. The proper dimensions of the public controversy requirement have proved difficult to define. For examples of courts' grappling with this problem, see Comment, *Defining a Public Controversy in the Constitutional Law of Defamation*, 69 Va. L. Rev. 931 (1983).

smuggling ring. In fact, Marcone, along with 24 other co-defendants, was indicted for conspiracy and other charges in a nationwide drug trafficking operation which sold an estimated 15,000 tons of marijuana, reputedly worth up to two billion dollars, between 1972 and 1974. At the time of the indictment, law enforcement authorities noted that the ring was the largest drug smuggling operation ever uncovered in the United States. Drug trafficking of such mammoth proportions, which is one of the most troubling issues of our time, surely falls within the ambit of public controversy.[8]

Since it is clear that the alleged libel involves a public controversy, it is necessary to examine the nature and extent of Marcone's participation in it. In general, to be a limited purpose public figure, the plaintiff must voluntarily thrust himself into the vortex of the dispute. From the voluntary act is derived the notion of assumption of the risk and the consequent fairness in labelling the person a public figure. In the typical limited purpose public figure case, the plaintiff actively participates in the public issue in a manner intended to obtain attention. For example, a meat producer that aggressively advertised its product in the media becomes a limited purpose public figure for comment on the quality of its product. *See Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273-74 (3d Cir. 1980). Similarly, an agent who holds news conferences to attract media attention for himself and his client is a public figure in that context. *Woy v. Turner*, 573 F. Supp. 35 (N.D. Ga. 1983).

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8. We reject the notion that merely because most people would agree that drug trafficking is undesirable, there is no "controversy" regarding the matter. *See Wolston*, 443 U.S. at 163 n.6; Smolla, *Let the Author Beware: The Rejuvination of the American Law of Libel*, 132 U. Pa. L. Rev. 1, 56-57 (1983).

In other defamation cases, the plaintiff's action may itself invite comment and attention, and even though he does not directly try or even want to attract the public's attention, he is deemed to have assumed the risk of such attention. *See, e.g., Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978); *see also Smolla, supra* note 8, at 68-71 (citing numerous examples of individuals deemed public figures).

Somewhat related, courts have classified some people as limited purpose public figures because of their status, position or associations. For example, sports figures are generally considered public figures because of their position as athletes or coaches. *See, e.g., Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979) (en banc); *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1113 (N.D. Cal. 1984). If a position itself is so prominent that its occupant unavoidably enters the limelight, then a person who voluntarily assumes such a position may be presumed to have accepted public figure status. The district court in *Chuy* stated

> Where a person has, however, *chosen* to engage in a profession which draws him regularly into regional and national view and leads to "fame and notoriety in the community," even if he has no ideological thesis to promulgate, he invites general public discussion .... If society chooses to direct massive public attention to a particular sphere of activity, those who enter that sphere inviting such attention must overcome the *Times* standard .... This is especially so in this case where the subject matter pertained to Donald Chuy's ability to continue playing professional football, a matter in which the sports loving public had a not insignificant interest.

Chuy v. Philadelphia Eagles Football Club, 431 F. Supp. 254, 267 (E.D. Pa. 1977), *aff'd*, 595 F.2d 1265 (3d Cir. 1979) (en banc).

In addition to sports figures, others have been classified as limited purpose public figures by virtue of their associations or positions. For example, the Fifth Circuit deemed Louis Rosanova, a reputed underworld personality, a public figure in the context of his connection to organized crime. *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978). Although never convicted of a crime, Rosanova had been the subject of governmental investigations and criminal prosecutions. 411 F. Supp. at 444. Moreover, his alleged underworld ties had been the subject of considerable media attention. Asserting that he never sought such a status, Rosanova vigorously argued he was not a public figure. However, because some of his contacts with underworld figures were not denied, the court held that Rosanova voluntarily engaged in a course of activity that was bound to invite attention and comment. *See Smolla*, *supra* note 8, at 70 n.332 (citing *Rosanova* with approval). The Fifth Circuit went on to say

> In our view of the law resulting from the inevitable collision between First Amendment freedoms and the right of privacy, the status of public figure *vel non* does not depend upon the desires of an individual. The purpose served by limited protection to the publisher of comment upon a public figure would often be frustrated if the subject of the publication could choose whether or not he would be a public figure. Comment upon people and activities of legitimate public concern often illuminates that which yearns for shadow. It

> is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose to be. It is sufficient, as the district court found, that "Mr. Rosanova voluntarily engaged in a course that was bound to invite attention and comment." 411 F. Supp. at 445

580 F.2d at 861:[9] *see also Barger v. Playboy Enterprises, Inc.*, 564 F. Supp. 1151, 1156 (N.D. Cal. 1983) (wives of Hell's Angels are public figures), *aff'd*, 732 F.2d 163 (9th Cir.), *cert. denied*, 105 S. Ct. 175 (1984).

C.

With regard to the nature and extent of Marcone's participation in drug activities, Penthouse points to

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9. Some courts and commentators have questioned whether *Gertz* also created a third class of public figures: the involuntary public figure. *See, e.g., Waldbaum*, 627 F.2d at 1295 n.18; *Steaks Unlimited*, 632 F.2d at 272-73; Note, *The Involuntary Public Figure Class of* Gertz v. Robert Welch: *Dead or Merely Dormant?*, 14 U. Mich. J.L. Ref. 71 (1980). In general, rather than creating a separate class of public figures, we view such a description as merely one way an individual may come to be considered a general or limited purpose public figure. Thus, to the extent a person attains public figure status by position, status, or notorious act he might be considered an involuntary public figure. The one group of individuals that might truly be considered involuntary public figures are relatives of famous people. *See* Meeropol v. Nizer, 381 F. Supp. 29 (S.D.N.Y. 1974) (children of Julius and Ethyl Rosenberg are public figures), *aff'd (in relevant part)*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *see also* Carson v. Allied News Co., 529 F.2d 206, 210 (7th Cir. 1976) (wife of famous entertainer a public figure); Note, *An Analysis of the Distinction Between Public Figures and Private Defamation Plaintiffs Applied to Relatives of Public Persons*, 49 S. Cal. L. Rev. 1131 (1976). In *Gertz*, the Supreme Court cautioned that "the instances of truly involuntary public figures must be exceedingly rare." 418 U.S. at 345.

three factors which it asserts establish Marcone as a limited purpose public figure: (1) Marcone's indictment in the drug trafficking conspiracy and the attendant publicity; (2) his representation of motorcycle gang members; and (3) his non-representational ties to the Pagans and Warlocks.

After determining that the allegedly libelous statement concerns a public controversy, it is necessary to examine the nature and extent of Marcone's involvement in it. Marcone, along with 24 other co-defendants was indicted in Detroit for allegedly participating in a nationwide drug trafficking ring which at that time reportedly was the largest drug smuggling case in United States history. Marcone's indictment was widely reported by the Philadelphia area media. The headline story in *The Evening Bulletin* on February 11, 1976, the day after the indictment was handed down, was entitled "Media Lawyer Accused of Role in Drug Ring." The article reported the massive scale of the alleged ring with one ironic twist to the story. The original Detroit indictment named only one Philadelphia area man -- Frederick Frey. Marcone was representing Frey with respect to the indictment when the grand jury issued a superseding indictment naming Marcone, Frey and two other men with Philadelphia connections: James Heron and Joseph Mealy. *The Evening Bulletin* article quoted Marcone as expressing his surprise and professing his innocence with respect to his indictment.

Penthouse points to Marcone's indictment and the accompanying publicity to establish him as a limited purpose public figure. In *Wolston*, the Supreme Court rejected the contention that "any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction." 443 U.S. at 168; *cf.*

Firestone, 424 U.S. at 457 (status as participant in litigation does not automatically render one a public figure). Although the criminal activity, by itself, may not create public figure status, such activity may, nevertheless, be one element in a mix of factors leading to that classification. *See Rosanova*, 580 F.2d at 861; *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1116 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979). Moreover, the crime involved in *Wolston* was particularly passive -- a contempt citation for failure to appear at a grand jury hearing because of ill health. In the present case, however, Marcone was indicted for participating, not in a passive manner, in a drug conspiracy. This factor may be considered in our analysis of Marcone's status. *See Rosanova*, 580 F.2d at 861.

Marcone's indictment was widely reprinted in the local media. Moreover, the drug ring with its prominent local connection became the subject of intense attention by the Philadelphia media. In this regard, federal law enforcement agents were quoted as saying that the four Philadelphia-area co-indictees frequently met at the Castle, a large mansion in Delaware County which served as the headquarters for the Pagans motorcycle gang. Numerous news stories focused on the Castle and a list of illegal activities connected with it, including drugs, stolen goods, and the disappearance and suspected murder of five young women. Subject to even closer scrutiny were the occupants of the Castle, the Pagans, and a rival gang, the Warlocks. Federal sources linked the Pagans and their illegal drug activities to the two billion dollar drug-smuggling ring brought to light by the Detroit indictment.

Plaintiff was closely linked to the Castle and the Pagans in a number of ways. Marcone had a significant criminal practice and frequently represented the Pagans and Warlocks in legal matters. Representation

of such notorious groups does invite attention, and, in fact, this legal relationship was widely reported in the Philadelphia-area media. Nevertheless this evidence is not determinative in our analysis. Legal representation of a client, by itself, does not establish an individual as a public figure. To hold otherwise would place an undue burden on attorneys who represent famous or notorious clients. *See Gertz*, 418 U.S. at 352; *Steere v. Cupp*, 226 Kan. 566, 571, 602 P.2d 1267, 1273-74 (1979).

Of course, if an attorney does more than merely represent the client in a strictly legal context -- such as holding news conferences or otherwise affirmatively making a public issue of the case -- then those activities may be counted in the public figure calculus. *See, e.g., Ratner v. Young*, 465 F. Supp. 386, 399-400 (D.V.I. 1979) (defense attorneys in widely publicized trial deemed public figures because of their out of court activities); *see also Woy v. Turner*, 573 F. Supp. 35 (N.D. Ga. 1983) (sports agent who uses media to promote his clients and himself is a limited purpose public figure). Nothing in the record of the present case indicates that Marcone was engaged in bringing attention to his clients or himself in regard to their legal relationship. Thus we may give only limited significance to Marcone's representational activities in the public figure analysis.

More important for the limited public figure determination are Marcone's non-representational contacts with the Pagans. As noted, Marcone reportedly met at the Pagans' headquarters with Frey, Heron and Mealy. In addition, one newspaper article reported that Marcone admitted to going on occasional weekend trips with motorcycle gang members. For purposes of public figure analysis we must look to Marcone's actions in addition to his intentions. There is no evidence that his conduct was intended to attract

attention; but this does not end our inquiry. As the Fifth Circuit noted in *Rosanova*, it may be sufficient that Marcone engaged in a course of conduct that was bound to attract attention and comment.

In this regard, Marcone's non-representational connections to the Castle and the Pagans are sufficient to tip the balance in the calculation. Both the Pagans and their headquarters were linked to the two billion dollar drug ring, *i.e.*, the public controversy surrounding the alleged libel. We find that Marcone's voluntary connection with motorcycle gangs -- including his meetings at the Castle with Frey and his occasional weekend trips with them -- in conjunction with the intense media attention he engendered is sufficient to render Marcone a public figure for the limited purpose of his connection with illicit drug trafficking.

This is a close case, and if each element of the equation is taken separately it may be argued that no one aspect may be sufficient to create public figure status. Nevertheless, when all the relevant factors are considered in context and as a whole, we believe that Marcone has crossed the line from private to limited purpose public figure.

We are in agreement with the Fifth Circuit that if Marcone's actions are sufficient to transform him into a limited public figure, it is of no moment that Marcone did not desire such status. The purpose of the first amendment would be frustrated if those persons and activities that most require public scrutiny could wrap themselves in a veil of secrecy and thus remain beyond the reach of public knowledge. *Cf. Medico v Time, Inc.*, 643 F.2d 134, 142 (3d Cir.) (noting difficulty but importance of reporting on organized crime), *cert. denied*, 454 U.S. 836 (1981). We recognize that there are countervailing dangers from a media that has

untrammeled freedom to publish inaccurate and damaging statements with impunity. Moreover, when a sensational story by one news organization is picked up by many, the snowballing of media attention may transform an unknown individual into a virtual celebrity almost overnight. The possibility therefore exists that by relying on this snowballing of attention a media defendant might be able to bootstrap itself into first amendment protection. Such a sequence of events might concededly defeat public figure status in an appropriate case, but plaintiff's situation is not such a case.

Given the public nature of the activities at issue here, the widespread media attention and the significiant contact to the Pagans of a non-representational type, we hold that Marcone has crossed the threshold and become a limited purpose public figure.[10] Accordingly, the district court erred in not classifying Marcone as a limited purpose public figure.[11]

IV.

Since Marcone is a limited purpose public figure, he must establish libel under the *New York Times* actual malice standard. Because the district court ruled that Marcone was a private figure, it permitted the jury to award compensatory damages upon a demonstration that Penthouse merely was negligent in

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10. We note that theoretically the passage of time might permit a public figure to regain private status, but such was not the case here.

11. This decision is tied to the facts of this case. We emphasize that we do not hold that an attorney whose connection to notorious clients remains purely professional or any person charged with a crime automatically becomes a limited purpose public figure.

publishing the article.[12] Nevertheless, the trial court did not charge the jury that Marcone had to demonstrate actual malice to recover punitive damages. The jury did award Marcone punitive damages, thus demonstrating that the jury found that Marcone had met the requisite standard. Accordingly, even though the judge incorrectly charged the jury regarding compensatory damages, if the jury properly found that Marcone has proven that Penthouse published the article with actual malice, the jury's award of compensatory and punitive damages could be upheld.

Penthouse, however, challenges the award of punitive damages to Marcone, complaining that such an award was based on an erroneous jury instruction. Regarding punitive damages, the judge instructed the jury:

> The plaintiff must prove by a *preponderance of the evidence* that the defamatory portions of the article were published either with knowledge of their falsity or with reckless disregard as to whether they were true or false. Punitive damages for the purpose of punishing a defendant for its *outrageous* conduct if you find, of course, that the plaintiff has proven by a *preponderance of the evidence* that the conduct of the defendant was *outrageous.*

App. at 1374a (emphasis added). Penthouse maintains that this charge misstates the actual malice standard

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12. Because we hold that Marcone was a public figure and had to prove actual malice to recover anything, we need not reach the propriety of the district court's ruling regarding the applicable standard for a private defamation plaintiff to recover compensatory damages. For the latest pronouncement by the Supreme Court of Pennsylvnaia on that subject, see Hepps v. Philadelphia Newspapers, Inc., No. J-66-1984 (Pa. Dec. 14, 1984).

and requires a lower burden of proof than is constitutionally mandated.

In *New York Times* the Supreme Court defined the "actual malice" standard as "knowledge that [the statement] was false or with reckless disregard of whether it was false or not." 376 U.S. at 280. Subsequently, the Court further explained the reckless disregard component of the actual malice standard. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). In *Gertz*, the Court equated reckless disregard with a "subjective awareness of probable falsity." *Gertz*, 418 U.S. at 335 n.6; *see also Steaks Unlimited*, 623 F.2d at 275.

As with actual damages, the Supreme Court has held that the states are free to impose punitive damages in defamation cases as long as they comport with the requirements of the First Amendment. In general, Pennsylvania permits punitive damages "against a person to punish him for his outrageous conduct." *Chambers v. Montgomery*, 411 Pa. 339, 334, 192 A.2d 355, 358 (1963) (quoting Restatement of Torts § 908(1)); *see also Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1276-79 (3d Cir. 1979) (en banc).

The district judge's instruction that plaintiff had to prove "outrageous conduct" appears to be an accurate reflection of Pennsylvania law.[13] However, to

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13. For the latest pronouncement on Pennsylvania law, see Hepps v. Philadelphia Newspapers, Inc., No. 5-66-1984, slip op. at 31 (Pa. Dec. 15, 1984) (holding that private defamation plaintiff must prove actual malice by clear and convincing evidence to recover punitive damages).

be permissible, the charge also had to meet the First Amendment requirements established by the Supreme Court. Because "outrageous conduct" does not connote subjective awareness of falsity, we agree with Penthouse that the judge's charge regarding the definition of actual malice was flawed.

B.

In addition, defendant complains that the district judge incorrectly instructed the jury regarding the burden of proof for punitive damages. In *New York Times*, the Supreme Court stated that "the proof presented to show actual malice lacks *the convincing clarity* which the constitutional standard demands." 376 U.S. at 285-86 (emphasis added). This statement has been understood to mean that when a plaintiff has the burden of proving actual malice, he must do so by "clear and convincing" evidence. In *Gertz*, for example, the Court emphasized that the actual malice standard is satisfied "only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." 418 U.S. at 342; *see also Bose Corp. v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949, 1965 n.30 (1984).

We agree with Penthouse that in the present case, the public figure plaintiff had to prove actual malice by clear and convincing evidence. Consequently, we need not determine the appropriate level of proof (*i.e.*, clear and convincing or preponderance of the evidence) that a private defamation plaintiff must demonstrate to recover punitive damages.

V.

Because the jury received incorrect instructions regarding the proper level of proof and the definition of actual malice, its award of punitive damages was made under a constitutionally deficient standard. Therefore,

we cannot use that verdict as a predicate to affirm the award of compensatory as well as punitive damages. But, rather than remand for a new trial, we have the power to make a de novo review of the evidence of actual malice. *See Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971); *New York Times*, 376 U.S. at 284-86. In First Amendment cases, "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949, 1958 (1984) (quoting *New York Times*, 376 U.S. at 285). Accordingly, a de novo review is not only within our province, but is an affirmative duty of a reviewing court.

> It reflects a deeply held conviction that judges ... must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Bose, 104 S. Ct. at 1965; *see also Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, 140 (2d Cir. 1984).

VI.

Penthouse's article contains two inaccuracies with respect to plaintiff. First, it states as a fact that Marcone purchased $25,000 worth of marijuana when

Marcone was only indicted but never convicted of such conduct. Second. the article incorrectly declares that the reason charges against Marcone were dropped was because he cooperated with the authorities.

A.

The original draft of the article. submitted by free-lance author Edward Rasen. apparently made the assertion that Marcone had purchased marijuana. Penthouse points to three sources to demonstrate that this factual error was made without actual malice. First. the magazine relied on the experience and reputation of Rasen. Mr. Goode. Penthouse's editorial director in 1978. had known Rasen as an investigative reporter and writer since the early 1970's. In 1971. when Goode was at *Earth Magazine*. he hired Rasen to provide information about Vietnam and found Rasen's material to be reliable. In 1978 Rasen approached Penthouse regarding a series of articles on drugs. Goode appointed John Lombardi. an articles editor. to work with Rasen. Lombardi testified. by deposition. that Rasen had previously written for several west coast newspapers. including the Los Angeles Times. and worked in electronic journalism for west coast television stations. Lombardi. like Goode. found Rasen to be a very professional investigative journalist. Reliance on the professional reputation of an author may help to defeat an allegation of actual malice.[14]

Failure to investigate. without more. does not demonstrate actual malice. *See St. Amant*. 390 U.S. at 731: *New York Times*. 376 U.S. at 288. In *St. Amant*.

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14. Ironically. Rasen himself was indicted in Detroit along with Marcone in the drug conspiracy. Plaintiff does not dispute. however. that Penthouse had no knowledge of this fact before it published the article. In light of Goode's personal knowledge of Rasen and the author's general reputation. at most. Penthouse might have been negligent for not investigating Rasen's background.

Deputy Sheriff Thompson sued St. Amant, a candidate for public office, for defamation. Based on a source whose reputation he did not know and without any independent investigation, St. Amant incorrectly asserted that Thompson had taken bribes. The Supreme Court held that on those facts actual malice was lacking because "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant*, 390 U.S. at 731; *see also New York Times*, 376 U.S. at 288 (failure of newspaper's employees to verify the facts contained in an advertisement against new stories in its own files amounted at most to negligence, and was "constitutionally insufficient to show the recklessness that is required for a finding of actual malice.")

The Court noted that there are limitations on the actual malice element of First Amendment protection. A mere assertion by the publisher that he thought the statement published to be true does not automatically defeat actual malice. In some instances, bare professions of good faith may be unpersuasive, such as where the "publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *St. Amant*, 390 U.S. at 732. But, the Court reiterated, mere failure to investigate does not establish bad faith.

Thus even if Penthouse had failed to investigate, its reasonable reliance on Rasen arguably would have been sufficient to defeat plaintiff's attempt to show actual malice. Here, however, Penthouse did attempt to verify the assertions in the article; its editors obtained a copy of the Detroit indictment that charged Marcone with the crime for which the article stated he

committed. In addition, the magazine had an article from the *Philadelphia Inquirer*, dated March 18, 1976, which reported on Marcone's indictment. Consequently, in publishing the information about Marcone, Penthouse relied on the apparent reputation of Rasen, partially based on his prior relationship with Penthouse staffers. Rasen's notes, a copy of the Detroit indictment, and the article in the *Philadelphia Inquirer*. The statement was not so "inherently improbable" that defendant should have been put on notice as to its probable falsity. *See St. Amant*, 390 U.S. at 732. While the newspaper article and indictment do not prove the truth of the assertion, they are sufficiently related to the statement in question that we cannot say the whole story is a fabrication or a product of the author's imagination. Penthouse may have been negligent in not investigating further to determine the veracity of the statement, *see Dickey v. CBS*, 583 F.2d 1221 (3d Cir. 1978), and in failing to distinguish between an allegation and a proven fact. But the failure to use the word "alleged," under these circumstances, does not establish actual malice. *See Time, Inc. v. Pape*, 401 U.S. 279 (1971); *see also Ryan v. Brooks*, 634 F.2d 726 (4th Cir. 1980).

B.

The second error contained in the article is that charges against Marcone were withdrawn because of his cooperation with the authorities. In fact, charges against Marcone were dismissed without prejudice so that he could be reindicted in Philadelphia. Two earlier versions of the article do not contain this misinformation. They both state that "charges were dismissed in favor of another indictment." App. at 38a, 94a. Both Goode and Lombardi were unable to explain why or when this change occured.

The source of the mistaken alteration is clear, however: Penthouse produced a report of a hearing on illicit Mexican-American drug traffic before a Senate Subcommittee. *Illicit Traffic in Weapons and Drugs Across the United States-Mexican Border: Hearings Before the Permanent Subcommittee on Investigations of the Senate Comm. on Gov't Operations*. 95th Cong., lst Sess. 24 (1977). This report, supplied to the Senate Subcommittee by the Drug Enforcement Administration, listed the disposition of drug conspiracy charges against a number of individuals. The relevant part of the report states:

> Defendant: Charles S. Hewett (Class I).[1]
> Maximum sentence: 5 years.
> Actual sentence: Dismissed at request of Government due to cooperation.
> Defendant: Blanca Reid (Class III).
> Maximum sentence: 5 years.
> Actual sentence: Dismissed in interest of Justice.
> Defendant: Frank Marcone (Class III).
> Maximum sentence: 5 years.
> Actual sentence: Dismissed (to be reindicted in Philadelphia).
> Defendant: Michael Hearn (Class III).
> Maximum sentence: 5 years.
> Actual sentence: Dismissed (to be reindicted in Philadelphia).

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1. *Defendants* [sic] *sentence reduced at the request of the U.S. Attorney's Office due to cooperation.* (emphasis added).

Footnote one, which refers only to Charles S. Hewett, indicates that Hewett cooperated with the government in order to receive a reduced sentence. All that is stated

about Marcone is that his indictment was dismissed and that he was to be reindicted in Philadelphia. Someone at the magazine apparently misread the footnote as also referring to the individuals listed below Hewett, including Marcone, or somehow confused the two men. Immediately below Marcone in the Penthouse article's list of "attorney criminals" is Hewett. With regard to Hewett, Penthouse correctly states that charges against him were dismissed because of cooperation with the government. The mistake regarding Marcone might be called unprofessional, even negligent, but it cannot be said to rise to the level of actual malice.

In reviewing the jury's verdict, the district court found that these two errors did constitute actual malice. 577 F. Supp. at 328-32. In doing so, the court mistakenly focused on the falseness of the statements. Although the lack of truthfulness of a statement is a prerequisite to liability, mere falsity, without more, is generally not sufficient to establish actual malice. *See St. Amant*, 390 U.S. at 732. Neither statement was so inherently improbable that Penthouse should have been put on notice of the probability of falseness. In addition, though Penthouse was arguably negligent in not checking further into the background of Rasen, the personal knowledge and reputation of Rasen were sufficient so that the magazine could reasonably have placed some reliance upon him for purposes of defeating actual malice. Both mistakes appear to be the result of insufficent editorial verification and checking procedures, but not of a conscious decision to present Marcone in a false light.

Thus based on our independent review of the record we conclude that the plaintiff failed to prove, either by clear and convincing evidence or even by a preponderance of the evidence, that the libelous

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statement was published with actual malice.[15]

The judgement of the district court will be reversed and judgment for the defendant will be entered.

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15. Because of our disposition of the case, we do not reach defendants' other grounds for attacking the judgment for Marcone.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-1004

MARCONE, FRANK J.,
Appellee

v.

PENTHOUSE INTERNATIONAL MAGAZINE FOR MEN
and
PENTHOUSE INTERNATIONAL, LTD.
and
MEREDITH PRINTING CORP.
and
CURTIS CIRCULATION COMPANY
and
RASEN, EDWARD

PENTHOUSE INTERNATIONAL, LTD.,
Appellant

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
C.A. No. 78-3733

Argued July 20, 1984

Before: ADAMS, HIGGINBOTHAM,
and VAN DUSEN, Circuit Judges

(Filed February 6, 1985)

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel July 20, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered July 20, 1982, and made final by the orders of the said District Court entered November 21, 1983, and December 15, 1983, be, and the same are hereby reversed and judgment for the defendant will be entered. The foregoing in accordance with the opinion of this Court. Costs to be taxed against the appellee.

ATTEST:
Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-1004

MARCONE, FRANK J.,

v.

PENTHOUSE INTERNATIONAL MAGAZINE FOR MEN, et al.

PENTHOUSE INTERNATIONAL, LTD.,
Appellant

(C.A. No. 78-3733)

(Filed March 1, 1985)

Present: ALDISERT, Chief Judge,
SEITZ, ADAMS, GIBBONS, HUNTER,
WEIS, GARTH, HIGGINBOTHAM, SLOVITER,
and VAN DUSEN,* Circuit Judges

SUR PETITION FOR REHEARING IN BANC

The petition for rehearing in banc filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this

Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing in banc is denied.

BY THE COURT,

ARLIN M. ADAMS, J.

* As to panel rehearing only.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK MARCONE	:	
	:	CIVIL ACTION
v.	:	NO. 78-3733
	:	
PENTHOUSE INTERNATIONAL, LTD. and EDWARD RASEN	:	

MEMORANDUM

BRODERICK, J. February 22, 1982

This defamation action is currently before the Court on the motion of defendant, Penthouse International, Ltd. for summary judgment. For reasons set forth herein, defendants' motion is denied.

I. Undisputed Facts

In 1976, plaintiff Frank Marcone, an attorney maintaining an office in Media, Pennsylvania, was arrested by Federal Drug Enforcement Agents pursuant to an indictment issued by a Federal Grand Jury

for the Eastern District of Michigan, Southern Division (Detroit). A superseding indictment charged, inter alia, that Frank Marcone, Frederick Frey and other named defendants willfully, knowingly and unlawfully did combine, conspire, confederate and agree together and with each other, and with divers other persons to unlawfully possess with intent to distribute, and to distribute marijuana, 21 U.S.C. §§841(a)(1) and 846. More specifically, the indictment charged as follows:

> It was further a part of said conspiracy that defendant and co-conspirator FRANK MARCONE, during the period of this conspiracy, would supply sums of United States currency to defendant and co-conspirator FREDERICK R. FREY in Philadelphia, Pennsylvania for the purpose of investing said monies in the distribution of marijuana by FREDERICK R. FREY for a profit.

* * * * * *

> During May, 1974, FRANK MARCONE gave $25,000 in United States currency to FREDERICK R. FREY in Philadelphia, Pennsylvania, for the purpose of purchasing multi-hundred pound quantities of marijuana in California.

In May 1976, the indictment against Mr. Marcone was dismissed. The Assistant United States Attorney was quoted in newspaper accounts submitted by Penthouse, as stating that charges were dismissed without prejudice because of a legal technicality in tying Marcone to the larger conspiracy involving individuals from San Diego to Montreal. Mr. Marcone has not been re-indicted.

In October 1978, defendant, Penthouse International, Ltd. (Penthouse) published and distributed for sale the November 1978 issue of "Penthouse, The International Magazine for Men" which included an article entitled "The Stoning of

America," authored by defendant Edward Rasen, who has not been served in this action. Beneath the title of the article appeared a descriptive subtitle which stated, "Marijuana is now big agribusiness -- a $12 billion a year corporate growth crop." The article, reproduced in part below, contains the following reference to Mr. Marcone:

> "Today there is no meaningful deterent to narcotics trafficking," says U.S. Sen. Sam Nunn. "Sophisticated narcotics dealers, with their vast financial resources, could reasonably determine that crime does, in fact, pay." The hippy dope dealers of the 1960s counterculture have been replaced by "hip" businessmen who sport short hair, three-piece suits and college degrees and have transformed a cottage industry into a multi-national corporate agribusiness, in which guns and murder enforce executive-suite investment decisions. The new breed of traffickers are young, intelligent and upper middle class. They operate outside traditional crime families and ghetto areas, though, by any standard, large-scale marijuana smuggling can be considered orga-

nized crime. However, the names of known criminals or members of Mafia families seldom appear in the investigations or court records of busted major syndicates.

Instead, the typical new dope businessman is an attorney. We have criminal attorneys, and attorney criminals, says Fred Rody, Miami DEA regional director. "There is such a thing as criminal consort. We know that some of the large smuggling operations have lawyers who are providing them with all the advice they need to operate."

<u>However, even after DEA agents spent more than two years building an airtight case against a Mexican-American syndicate involved in the multi-million-dollar, nationwide wholesaling of marijuana, federal judges did not sentence any of the attorney criminals to prison.</u>

Examples: Richard J. Litner, a practicing attorney in Boston, financed sales in New England and set up "cover" corporations, yet was offered the opportunity by federal judge Charles W. Joiner, without the consent of the prosecutor, to plead guilty to reduced charges. He was then placed on one-year probation so that he would not be disbarred and deprived of his livelihood. Attorney John K. Lowe, of Denver and Kansas City, made a hand-to-hand sale of 400 pounds of marijuana to an under-

cover agent for $40,000. He received two years' probation and a $1,000 fine. As a law student, George Weingarten, now a practicing attorney in San Diego, once received a gold Rolex wristwatch as a sales reward for distributing 10,000 pounds of marijuana in one week. He became a DEA informant in exchange for a reduced sentence of one-year probation. Maria Blanca-Vargas Reid, executive director of the San Diego Mental Health Association, handled a $35,000 drug payment. Charges were dismissed in the interest of justice after she cooperated with federal authorities and revealed the whereabouts of her son, Robert Craig Chipman, and his criminal associates. Frank Marcone, an attorney from the Philadelphia area, contributed down payments of up to $25,000 on grass transactions. Charges against him were dismissed because he cooperated with further investigations.
Charles Sargent Hewett, a law student from Corona Del Mar, Calif., wholesaled up to $750,000 of marijuana per week. Charges were dismissed at the request of the U.S. attorney's office for his cooperation in identifying all the people he sold to, even though he was involved in the murder of his former distributor in Boston and the attempted murder of one of his associates from San Francisco. And so on. (emphasis added)

II. Applicable Law

Mr. Marcone complains in this action that the article has defamed him in that it declares that he was actually guilty of the offense and that the charges were dismissed because he cooperated with the police by providing information. Mr. Marcone contends that these statements are not true and that they have caused him harm and ridicule among his neighbors, business acquaintances and other citizens. Mr. Marcone also asserts that the use of the phrase "attorney criminals" is also defamatory and that the mention of his name in the context of the article is defamatory in that it implies that he participated or was involved in the type of illegal activities discussed in the article. Penthouse presents several grounds in support of its motion

for summary judgment. In essence, they are: (1) the statements are not capable of defamatory meaning; (2) even if defamatory, the statements are privileged under Pennsylvania law as a substantially fair and accurate report of a judicial proceeding; (3) plaintiff is a public figure and cannot make the showing of actual malice required of public figures by the First Amendment; (4) the article involved matters of public concern and under Pennsylvania law, in cases where the alleged defamatory publication involved matters of "public or general concern," the defendant must prove actual malice, and plaintiff cannot make such a showing in this case; (5) the statements are true, and (6) the plaintiff cannot prove special damages.

The parties agree that Pennsylvania

law governs the substantive issues in this case and inasmuch as Pennsylvania has an interest in the outcome of this litigation -- plaintiff is a citizen of Pennsylvania and the alleged injury to plaintiff's reputation and business apparently occurred in Pennsylvania, the locus of his legal practice -- there is no cause for this Court, sua sponte, to challenge the parties' consensual choice of law. See Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 270 (3d Cir. 1980) and cases cited therein at p. 270 n.13. Accordingly, this Court shall look to the law of Pennsylvania and, insofar as applicable, to the First Amendment of the Constitution of the United States in disposing of this summary judgment motion.

A. The Defamatory Character of the Statements

In an action for defamation in Pennsylvania, the plaintiff bears the burden of proving both the defamatory character of the communication and the understanding by the recipient of it as intended to be applied to the plaintiff. 42 Pa. Cons. Stat. Ann. Tit. §8343 (1979). It is the function of the court to determine, in the first instance, whether the communication complained of is capable of a defamatory meaning. Franklin Music Co. v. American Broadcasting Co., 616 F.2d 528, 540 (3d Cir. 1979); Hanish v. Westinghouse Broadcasting Company, 437 F. Supp. 397 (E.D. Pa. 1980); Corabi v. Curtis Publishing Co., 441 Pa. 432, 442, 273 A.2d 899, 904 (1971). A statement is defamatory where

it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 267 (3rd Cir. 1980); Corabi v. Curtis Publishing Co., 441 Pa. at 442, 273 A.2d at 904.

Penthouse has attempted to break down the alleged defamatory statements into a series of phrases and to argue that each phrase, i.e., "charges against him were dismissed" "because he cooperated with further investigations," is not capable of defamatory meaning. However, in determining the meaning of an allegedly libelous communication, it must be read in the context of the entire communication. Corabi v. Curtis Publishing Company, 441 Pa. at 444, 273 A.2d at 906;

Restatement (Second) of Torts, §563, comment d (1977).

The article refers to "attorney criminals" and lists Mr. Marcone as an example of an attorney criminal. The article states that:

> even after DEA agents spent more than two years building an airtight case against a Mexican-American syndicate involved in the multi-million-dollar nationwide wholesaling of marijuana, federal judges did not sentence any of the attorney criminals to prison.
>
> Examples . . . . Frank Marcone, an attorney from the Philadelphia area, contributed down payments of up to $25,000 on grass transactions. Charges against him were dismissed because he cooperated with further investigations.

There is no question that the above statements are capable of defamatory meaning in that they clearly impute that Mr. Marcone committed a crime. Furthermore, the statements are actionable as

libel per se in that they impute the commission of an indictable crime by Mr. Marcone. See Baird v. Dun & Bradstreet, Inc., 446 Pa. 266, 274, 285 A.2d 166, 171 (1971); Solosko v. Parton, 383 Pa. 419, 119 A.2d 230, 232 (1956); Restatement (Second) of Torts, §571.

B. Defendant's Claim of Qualified Privilege

Penthouse claims that the statements relating to Frank Marcone contained in the article "The Stoning of America" were privileged under the common law of Pennsylvania as a fair and substantially accurate report of official or judicial proceedings. See Binder v. Triangle Publications, Inc., 442 Pa. 319, 275 A.2d 53 (1971); Restatement (Second) of Torts, §611 (1977); Prosser, Handbook of the Law of Torts, §118 at 830-31 (4th ed. 1971).

This privilege, however, is conditional rather than absolute and "is forfeited if the publisher steps out of the scope of the privilege or abuses the occasion." Sciandra v. Lynett, 409 Pa. 595, 600, 187 A.2d 586, 589 (1963); see Hanish v. Westinghouse Broadcasting Co., 487 F. Supp. at 401-402. Where, however, there is a question as to whether the statement is "a substantially fair and accurate" report of the proceedings, it is a question of fact to be decided by the jury unless the facts are such that but one conclusion can be drawn. See Hanish v. Westinghouse Broadcasting Co., 487 F. Supp. at 402; Biggans v. Foglietta, 403 Pa. 510, 513, 170 A.2d 345, 346 (1961).

Penthouse has attached to a memorandum accompanying its motion, a copy of the Superseding Indictment in Criminal Action

No. 6-180-191 filed in the United States District Court for the Eastern District of Michigan, Southern Division, and points out that paragraph 35 of that indictment states:

> During May, 1974, Frank Marcone gave $25,000 in United States currency to Frederick R. Frey in Philadelphia, Pennsylvania, for the purpose of purchasing multi-hundred pound quantities of marijuana in California.

Penthouse asserts that the statement appearing in its magazine is almost entirely verbatim from the indictment and, therefore, must be considered a fair and accurate report of the proceedings.

An indictment is a document returned by a grand jury containing allegations of criminal conduct; it is merely an accusation that the defendant committed a crime and, under our constitution, an indictment affords no inference of guilt.

Every defendant is presumed innocent until such time, if ever, the defendant enters a plea of guilty or the government establishes his guilt beyond a reasonable doubt.

In this case, the article published by Penthouse does not state that Mr. Marcone was "indicted for" the stated acts or that he "allegedly" committed criminal acts. Instead, the article simply states as fact that Mr. Marcone contributed down payments of up to $25,000 on grass transactions. In addition, the article states that "charges against him were dismissed because he cooperated with further investigations," a statement further imputing that Mr. Marcone did in fact put up the money for grass transactions. Penthouse has not produced any official record of any official proceeding or, for that

matter, any evidence whatsoever in their affidavits or depositions, stating or showing that the proceedings against Mr. Marcone were dismissed because he cooperated with further investigations. Mr. Marcone, on the other hand, has submitted an affidavit denying that the proceedings against him were terminated for the reasons stated in the article as well as denying that he contributed $25,000 for grass transactions. Thus, in light of the fact that the article states as fact that Mr. Marcone contributed down payments of up to $25,000 for grass transactions rather than stating that he was charged with, or allegedly committed such acts, this statement is not a fair and accurate report of a judicial proceeding. Furthermore, since there is no evidence before the Court to indicate that the

proceedings against Mr. Marcone were dismissed because he cooperated with further investigations, there is no basis upon which the Court can conclude that a statement to that efect is a fair and accurate report of any official or judicial proceeding. Thus, summary judgment is not available on the basis of the present record to Penthouse on the asserted privilege for fair and accurate reports of official or judicial proceedings.

C. The Public Figure Doctrine

Defendant next asserts that plaintiff is a public figure for the limited purposes of this action, and that he cannot demonstrate actual malice on the part of Penthouse as required of public figures in defamation actions by The New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct.

710, 11 L.Ed.2d 686 (1964) and Gertz v. Robert Welsh, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974). On the basis of the record presently before the Court, Mr. Marcone cannot be deemed a public figure.

In Gertz v. Welsh, supra, the Court identified various classes of public figures.

> Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

418 U.S. at 345, 94 S. Ct. at 3009.

The Court in Gertz further stated that the designation of an individual as a public figure may rest on either of two alternative bases:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

418 U.S. at 351. This record is devoid of evidence that Mr. Marcone is an individual who has achieved such pervasive fame or notoriety that he has become a public figure for all purposes and in all contexts. Penthouse, however, asserts that Mr. Marcone voluntarily injected himself into the midst of this public controversy and may be deemed a public

figure for issues relating to drug trafficking. Penthouse bases this contention on the fact that Mr. Marcone (1) chose to represent and associate with persons accused of trafficking in drugs; (2) sought to establish an expertise in the criminal defense of drug traffickers; (3) developed a reputation for such expertise; (4) perpetuated and sustained this reputation; (5) solicited clients in need of this expertise; and (6) promoted, solicited and presented this reputation to the public at large.

While the present record does not contain proof of all the above facts, such evidence would not, in and of itself, establish Mr. Marcone as a public figure for the limited purpose of issues related to drug trafficking. Indeed, Penthouse's argument would make all lawyers public

figures for the limited purpose of the issues relating to their field of practice.

In Gertz, supra, the Supreme Court was faced with a similar argument. A policeman was convicted of murder. The plaintiff, an attorney who represented the family of the victim in civil litigation against the policeman, brought a defamation action against defendant's magazine which purported to demonstrate that the murder trial was part of a communist conspiracy to discredit local police, that the attorney had arranged the policeman's "frame-up," and implied that the attorney had a criminal record, and labelled him a communist fronter. Despite the fact that the attorney had long been active in community and professional affairs, had served as an

officer of local civic groups and of various professional organizations, and had published several books and articles on legal subjects, the Supreme Court determined "Although petitioner was consequently well known in some circles, he had achieved no general fame or notoriety in the community." 418 U.S. at 352, 94 S. Ct. at 3013. Therefore, the Court concluded that he was not a public figure for all purposes. Turning to the question of the nature and extent of his participation in the particular controversy giving rise to the defamation, the Court stated:

> In this context it is plain that petitioner was not a public figure. He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted

> as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation.

In this case, on the basis of the present record, it is clear that Mr. Marcone's representation of private individuals on drug charges and his own indictment on such charges does not evidence an attempt on his part to engage the public's attention, or to thrust himself into the vortex of the controversy giving rise to the defamation, or to influence its outcome. Therefore, we determine, on the basis of the present record, that Mr. Marcone is not a public figure for the limited purposes of this action. Therefore, the Court concludes

that Penthouse is not entitled to summary judgment on the ground that Mr. Marcone is a public figure who cannot produce evidence of malice as required of public figures by New York Times and Gertz.

D. Defendants' Reliance on Matus v. Triangle Publications, Inc.

In Rosenbloom v. Metromedia, 403 U.S. 29, 91 S. Ct. 1811, 29 L.Ed.2d 296 (1971), three justices of the Supreme Court expressed the view that, where the allegedly defamatory publication involved matters of "public or general" concern, the First Amendment requires the plaintiff, irregardless of whether he is a private or public figure, to prove that the allegedly defamatory statements were made with knowledge of their falsity or with reckless disregard of the truth (malice). The following year the

Pennsylvania Supreme Court, in Matus v. Triangle Publications, Inc., 445 Pa. 384, 286 A.2d 357, cert. denied, 408 U.S. 930, 92 S. Ct. 2494, 33 L.Ed.2d 343 (1972), noting that five members of the Rosenbloom Court substantially agreed with the "public or general concern" test, "adopt[ed] as binding the . . . holding of the plurality opinion in Rosenbloom." 445 Pa. at 395, 286 A.2d at 363. Subsequently, however, the U.S. Supreme Court retreated from Rosenbloom in Gertz v. Robert Welsh, Inc., supra, by holding that the protection of First Amendment freedoms does not require persons who are private, as opposed to public, figures to prove malice in a defamation action.

The Pennsylvania Supreme Court has yet to reconsider the Matus decision in light of Gertz, causing our Third Circuit to

describe Pennsylvania's standard of liability for suits brought by private figure plaintiffs as "unsettled." Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 272 (3rd Cir. 1980). Penthouse argues that the Matus decision is still good law and that application of the public interest or concern test of Matus to the facts of the instant case mandates that Mr. Marcone prove that the allegedly defamatory communications were published by Penthouse with knowledge of their falsity or reckless disregard for the truth.

In predicting whether the Pennsylvania Supreme Court will follow Gertz and abandon Matus, this Court has been impressed by the reasoning of Judge Luongo in Mathis v. Philadephia Newspapers, Inc., 455 F. Supp. 406 (E.D. Pa. 1978), wherein he concludes:

> When the Supreme Court of Pennsylvania is ultimately faced with the question whether a "private figure" plaintiff may recover for defamation based on a showing of negligence, it will have to resolve that question by drawing on the policies that traditionally have shaped the Pennsylvania law of libel and slander. Although the common-law rule of strict liability is no longer viable in light of New York Times v. Sullivan, I see no reason to believe that the Supreme Court of Pennsylvania, which is now free to abandon the Rosenbloom "actual malice" standard in "private figure" cases, will choose to retain that standard. Nor have defendants pointed to any aspect of Pennsylvania law that would support such a prediction. Accordingly, I conclude that the Matus decision is no longer good law, and that a "private figure" defamation plaintiff may recover under Pennsylvania law based upon a showing of negligence. [footnote omitted]

Id. at 412.

Recently, in Medico v. Time, Inc., 509 F. Supp. 268 (E.D. Pa. 1980), affirmed, 643 F.2d 134 (3rd Cir. 1981) Judge Van Artsdalen endorsed Judge Luongo's deci-

tion in Mathis concluding, as we do now, that the Supreme Court of Pennsylvania, in light of Gertz, will retreat from the position taken in Matus. Accordingly, we must reject Penthouse's argument that it is entitled to summary judgment on the ground that Mr. Marcone cannot prove malice.

E. The Defense of Truth

Penthouse contends that under Pennsylvania's law of defamation, truth is an absolute defense to an action of defamation. The Court agrees. Penthouse claims that on the basis of the present record there are no genuine issues of material fact concerning the truth of the statements in the article relating to Mr. Marcone. The Court disagrees. Mr. Marcone's affidavit raises genuine issues

of material fact which preclude granting Penthouse's motion for summary judgment on the basis of the defense of truth.

F. Penthouse's Claim re Special Damages

Penthouse also claims that it is entitled to summary judgment on the ground that the present record shows that Mr. Marcone has not suffered special harm and cannot prove special damages. There is no question that the courts of Pennsylvania have always required proof of special damages in defamation cases which are not actionable per se. See Fogel v. Forbes, 500 F. Supp. 1081 (E.D. Pa. 1980). However, a motion for summary judgment can be granted only if the record shows "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a

matter of law." Fed. R. Civ. P. 56(c). The burden of demonstrating that these requirements have been met is on the moving party and the non-moving party is entitled to the benefit of all reasonable doubts and inferences that may arise in connection with the consideration of such a motion. Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L.Ed.2d 142 (1970); Poller v. Columbia Broadcasting System, 368 U.S. 464, 82 S. Ct. 486, 7 L.Ed.2d 458 (1962). In applying this standard to the record in this case, the moving party Penthouse has failed to demonstrate that there is no genuine issue as to whether Mr. Marcone has suffered specific harm and special damages. Additionally, as this Court has previously determined in this memorandum, the statements relating to Mr. Marcone

are libelous per se and Pennsylvania law is clear that special damages need not be proved in a case where the publication is libelous per se. Baird v. Dun & Bradstreet, 446 Pa. 266, 274, 285 A.2d 166, 171 (1971); Solosko v. Parton, 383 Pa. 419, 119 A.2d 230, 232 (1956); see Restatement (Second) Torts §§569-71. Accordingly, summary judgment must be denied in connection with Penthouse's claim that there is no genuine issue of material fact as to the absence of specific harm and special damages.

III. Conclusion

Therefore, in accordance with the above determinations, the Court will enter an order denying defendant's motion for summary judgment.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK MARCONE	:	
	:	CIVIL ACTION
v.	:	NO. 78-3733
	:	
PENTHOUSE INTERNATIONAL, LTD.	:	
and	:	
EDWARD RASEN	:	

O R D E R

AND NOW, this 22nd day of February, 1982, upon consideration of the motion of defendant Penthouse International, Ltd. for summary judgment, for the reasons set forth in this Court's memorandum dated February 22, 1982, IT IS ORDERED:

The motion of defendant Penthouse International, Ltd. for summary judgment is DENIED.

RAYMOND J. BRODERICK, J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK MARCONE	:	
	:	CIVIL ACTION
v.	:	NO. 78-3733
	:	
PENTHOUSE INTERNATIONAL, LTD. and EDWARD RASEN	:	

MEMORANDUM

BRODERICK, J. November 17, 1983

A jury has awarded compensatory damages of $30,000 and punitive damages of $537,500 to the plaintiff, Frank J. Marcone, and against the defendant, Penthouse International, Ltd., in this diversity defamation action. In an earlier opinion, 533 F.Supp. 353 (E.D.Pa. 1982), this Court ruled that the plaintiff was not a public figure for the purposes of this action, and that the relevant Constitutional limitations on

the Pennsylvania law of defamation were those imposed by Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). The Court also predicted that the Supreme Court of Pennsylvania would retreat from its holding in Matus v. Triangle Publications Inc., 445 Pa. 384, 286 A.2d 357 (1971), cert. denied, 408 U.S. 930, 92 S.Ct. 2494, 33 L.Ed.2d 343 (1972) and allow a private figure defamation plaintiff to establish liability under Pennsylvania law based upon a showing of negligence. See Bufalino v. Associated Press, 692 F.2d 266, 274 (2d Cir.1982), cert. denied, ___ U.S. ___, 103 S.Ct. 2463, 77 L.Ed.2d 1340 (1983).

The jury found that the plaintiff had been defamed by an article in the November, 1978 issue of the defendant's

publication "Penthouse, The International Magazine for Men". The article, authored by Edward Rasen, who was named as defendant but never served in this action, was entitled, "The Stoning of America." The article discussed the distribution and sale of marijuana to American markets. Its basic thrust was that the typical new drug businessman is an attorney for whom there is no meaningful deterrent to drug trafficking because federal judges do not sentence attorney criminals to prison. The plaintiff was listed as an example of an "attorney criminal," who "contributed down payments of up to $25,000 on grass transactions." The article stated that "charges against him were dismissed because he cooperated with further investigations." The jury found that the plaintiff had proved by a preponderance

of the evidence that the defamatory portions of the article were untrue, and were published by the defendant either with knowledge of their falsity or with reckless disregard as to whether they were true or false. The jury had been instructed that an award of punitive damages also required a finding that the defendant's conduct was outrageous. (Charge 37, 38).

The defendant has moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. The primary grounds advanced in support of the motion are: (a) the Court erred in charging the jury that an award of punitive damages required that the plaintiff prove knowledge of falsity or reckless disregard for truth or falsity by a preponderance of the evidence, the correct

burden of proof being "clear and convincing" evidence; (b) the plaintiff falied to provide sufficient evidence of knowledge of falsity or reckless disregard for the truth to support the jury's award of punitive damages; (c) the plaintiff failed to prove that the article was false; (d) the plaintiff failed to present competent evidence of special harm or other actual injury resulting from the libel; and (e) the amount of the punitive damages awarded was so excessive as to indicate passion and prejudice and was disproportionate to the award of compensatory damages. For the reasons which follow, the defendant's motion for judgment notwithstanding the verdict will be denied, and the moiton for a new trial will be denied, conditioned upon the plaintiff's acceptance of a reduction of

the punitive damage award to $200,000.

Motions for a new trial require the exercise of discretion by the Court whose "duty is essentially to see that there is no miscarriage of justice." 6A Moore's Federal Practice ¶59.08[5], at 59-160 (footnote omitted)(2d ed. 1974); Thomas v. E.J. Korvette, Inc., 476 F.2d 471, 474-75 (3d Cir.1973). The jury's verdict may be set aside only if manifest injustice will result if it were allowed to stand. The Court may not substitute its own judgment for that of the jury merely because the Court may have reached a different conclusion. To grant a motion for judgment n.o.v., the Court must find as a matter of law that the plaintiff failed to adduce sufficient facts to justify the verdict. Neville Chemical Co. v. Union Carbide Corp., 422

F.2d 1205, 1210 (3d Cir.), cert. denied, 400 U.S. 826, 91 S.Ct. 51, 27 L.Ed.2d 55 (1970). Such a motion "may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment." 5A Moore's, supra, ¶50.07[2], at 50-77 (footnote omitted); Korvette, supra, at 474. Douglas W. Randall, Inc. v. AFA Protective Systems, Inc., 516 F.Supp. 1122, 1124 (E.D.Pa. 1981), aff'd 688 F.2d 820 (3d Cir.1982). In the present case, the Court finds that the jury verdict is supported by the evidence and that the evidence is more than sufficient to meet the applicable Constitutionally-imposed standards. In addition, the Court does not believe that any trial errors exist which warrant the granting of a new trial and that no mani-

fest injustice will result if the jury verdict is allowed to stand, so long as the amount of the punitive damages award is reduced to $200,000.

A. STANDARD OF PROOF OF ACTUAL MALICE

The most troublesome contention raised by the defendant is that the Court erred in giving the jury the following interrogatory with respect to punitive damages:

> Do you find that the plaintiff proved by a preponderance of the evidence that the portions of the article which were defamatory of the plaintiff and untrue were published by the defendant either with knowledge of their falsity or with reckless disregard as to whether they were true or false?

The error, according to the defendant, was in charging that this finding must be made by a preponderance of the evidence rather than by clear and convincing evi-

dence. The defendant contends that this error requires a new trial. To succeed in this contention the defendant must show that the standard of the Court's instruction was erroneous, and that the failure to instruct as to the correct standard requires a new trial. As set forth below, the Court does not believe that it instructed the jury improperly, although the question is not free from doubt. However, even if the standard of the Court's instruction were incorrect, the error would not require a new trial, since under Pennsylvania law and under the relevant holdings of the Supreme Court the findings required to satisfy Constitutional standards may be made by this Court. The Court finds that the plaintiff has demonstrated that the defendant published the material defama-

tory of him with knowledge of falsity or reckless disregard of its truth or falsity, and the Court finds that this has been proven by clear and convincing evidence as well as by a preponderance of the evidence. A proper Constitutional basis therefore exists for the jury's award of punitive damages in this case.

As the Third Circuit as stated "[a]djudication of a defamation case under Pennsylvania law involves two principal inquiries: (1) whether the defendants have harmed the plaintiff's reputation within the meaning of state law; and (2) if so, whether the First Amendment nevertheless precludes recovery." Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 270 (3d Cir.1980). If the plaintiff is a private figure, "the First Amendment forbids states to impose liabi-

lity without fault, but otherwise permits them to 'define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.'" 623 F.2d at 272 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 347, 94 S.Ct. 2997, 3010, 41 L.Ed.2d 789 (1974)). As stated above, this Court has determined that Pennsylvania would allow a private figure to establish liability upon a showing of negligence, and this standard of liability is within the Constitutional requirements of Gertz.

Determination of damages in defamation actions, like determination of liability, follows the same two-step inquiry: the requirements of state law must be met, and the restrictions on the state law cause of action imposed by the

Constitution must not be violated. Again, within the limitations imposed by Gertz a state is free to define the relevant standards of proof. Dixson v.Newsweek, Inc., 562 F.2d 626, 629 (10th Cir.1977); Pirre v. Printing Developments, Inc., 468 F.Supp. 1028, 1043 (S.D.N.Y.) aff'd mem. 614 F.2d 1290 (2d Cir.1379). In this diversity case governed by Pennsylvania law, the Court, as stated at trial, must "apply the Pennsylvania law as to punitive damages except insofar as the Pennsylvania law as to punitive damages may have been limited by the Gertz language." (N.T. 7.185).

> The law in Pennsylvania is clear on the circumstances in which an award of punitive damages is permitted. "Punitive damages are damages, other than compensation, or nominal damages, awarded against a person to punish him for his outrageous conduct." Chambers v. Montgomery, 411 Pa. 339, 344, 192 A.2d 355, 358 (1963), quoting Restatement of Torts, § 908(1).

> See also, Focht v. Rabada, 217 Pa.Super. 35, 268 A.2d 157 (1970); Chuy v. Phila Eagles Football Club, 595 F.2d 1265 (3d Cir.1979); Thomas v. American Cystoscope Makers, Inc., 414 F.Supp. 255 (E.D.Pa. 1976). "Punitive damages are awarded only for outrageous conduct, ... for acts done with a bad motive or with a reckless indifference to the interests of others." Chambers, supra, quoting Restatement of Torts, § 908(1), comment (b).

Aetna Life and Casualty Co. v. McCabe, 556 F.Supp. 1342, 1356 (E.D.Pa.1983). Accordingly, the jury was instructed that to find punitive damages it must find that the conduct of the plaintiff was outrageous. (Charge 37, 38).

Gertz imposes Constitutional limitations on the recovery of damages by private individuals in defamation actions. The Supreme Court imposed these limitations to insure that excessive and unpredictable damage awards do not serve

to "punish unpopular opinion rather than to compensate individuals for injury sustained by publication of a false fact," and do not "unnecessarily exacerbate[] the danger of media self-censorship." 418 U.S. at 349-50, 94 S.Ct. at 3012. With respect to compensatory damages the Supreme Court stated:

> It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

Id. Compensatory damages are thus limited to compensation for actual injury, proven by competent evidence, although what constitutes actual injury is broadly defined.

The standard of the Constitutional limitation on the award of punitive damages is stated in two places in Gertz. The Court states its holding as follows: "we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U.S. at 349, 94 S.Ct. at 3011. After a discussion of the dangers of punitive damage awards in defamation actions against media defendants, the Court summarizes its holding: "In short, the private defamation plaintiff who

establishes liability under a less demanding standard than that stated by [New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)] may recover only such damages as are sufficient to compensate him for actual injury." 418 U.S. at 350, 94 S.Ct. at 3012.

The New York Times standard requires defamation plaintiffs who are public figures or public officials to prove "actual malice", that is, knowing falsity or reckless disregard of the truth or falsity of the defamatory statement, to establish liability. 376 U.S. at 280, 84 S.Ct. at 726. The standard has been further defined in a series of Supreme Court cases.

> Recklessness means that the publisher "in fact entertained serious doubts as to the truth of his publication," St. Amant v. Thompson, 390 U.S. 727, 731, 88

> S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968), or had a "subjective awareness of probable falsity." Gertz v. Robert Welch, Inc., 418 U.S. 323, 335 n. 6, 94 S.Ct. 2997, 3005 n. 6, 41 L.Ed.2d 789 (1974). This standard makes it "essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant." Herbert v. Lando, 441 U.S. 153, 160, 99 S.Ct. 1635, 1640, 60 L.Ed.2d 115 (1979). Although a publisher does not have an absolute duty to investigate, St. Amant v. Thompson, 390 U.S. 727, 733, 88 S.Ct. 1323, 1326, 20 L.Ed.2d 262 (1968), a publisher cannot feign ignorance or profess good faith when there are clear indications present which bring into question the truth or falsity of defamatory statements.

Gertz v. Robert Welch, Inc. (Gertz II), 680 F.2d 527, 538 (7th Cir.1982), cert. denied, ___ U.S. ___, 103 S.Ct. 1233, 75 L.Ed.2d 467 (1983).

Although the Supreme Court's opinion in Gertz clearly adopts the standard of conduct set forth in New York Times v. Sullivan as a predicate to the award of

punitive damages in a private figure defamation case, Gertz does not explicitly state what standard of proof should be applied. In public figure cases, actual malice, or "Times malice," must be shown by clear and convincing evidence before liability may be imposed. Gertz, 418 U.S. at 342, 94 S.Ct. at 3008; Steaks Unlimited, 632 F.2d at 275. No Third Circuit or Supreme Court case since Gertz has spoken to the question of what standard should be applied to punitive damages recoveries by private figures. Furthermore, the Court has found no Pennsylvania case holding that clear and convincing proof is required under state law before punitive damages may be awarded, and we predict that if faced with the question whether a higher standard should be applicable in defamation

cases the Pennsylvania Supreme Court would adhere to a preponderance standard. Authority from other jurisdictions bearing directly and explicitly on the question of what standard of proof is required by Gertz is surprising sparse and seems to weigh in favor of a preponderance standard. Compare Rimmer v. Colt Industries Operating Corp., 656 F.2d 323, 331 (8th Cir.1981) (Bright, J., concurring) (preponderance standard); Pirre v. Printing Developments, Inc., 468 F.Supp. at 1040, 1043 (same); Miller v. Lear Siegler, Inc., 525 F.Supp. 46, 62 (D.Kan.1981)(same) with General Products Co. v. Meredith Corp., 526 F.Supp. 546, 552 (E.D.Va.1981) (clear and convincing standard); Fitzgerald v. Penthouse Int'l Ltd., 525 F.Supp. 585, 597 (D.Md.1981) (same), rev'd 691 F.2d 666 (4th Cir.1982)

(appeals court did not reach burden of proof issue in deciding that a genuine issue of material fact existed as to actual malice), cert. denied, ___ U.S. ___, 103 S.Ct. 1277, 75 L.Ed.2d 497 (1983). Several courts have also stated that a showing of actual malice is required before punitive damages may be awarded to a private figure plaintiff, without stating explicitly the standard of proof to be applied. Golden Bear Distributing Systems v. Chase Revel, Inc., 708 F.2d 944, 947 (5th Cir.1983) (implying that the standard is the same as that needed to establish liability by a public figure); Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371, 375 n. 1 (6th Cir.), cert. granted, 454 U.S. 962, 102 S.Ct. 500, 70 L.Ed.2d 377, appeal dismissed 454 U.S. 1130, 102

S.Ct. 984, 71 L.Ed.2d 119 (1981); Littlefield v. Fort Dodge Messenger, 614 F.2d 581, 584 (8th Cir.), cert. denied, 445 U.S. 945, 100 S.Ct. 1342, 63 L.Ed.2d 779 (1980); Jenoff v. Hearst Corp., 453 F.Supp. 541 (D.Md.1978), aff'd 644 F.2d 1004 (4th Cir.1981) (implying the standards are the same); Handleman v. Hustler Magazine, Inc., 469 F.Supp. 1053, 1059 n. 11 (S.D.N.Y.1979).

It might well be contended that uniformity in the application of the actual malice standard could be furthered by imposing the clear and convincing standard on private figures seeking to recover punitive damages, just as it is imposed on public figures seeking to establish liability. In addition, the Supreme Court has noted that the "strong and legitimate state interest in compen-

sating private individuals for injury to reputation . . . extends no further than compensation for actual injury," Gertz, 418 U.S. at 348-49, 94 S.Ct. at 3011; this lessened state interest with respect to punitive damages may allow the imposition of a higher standard of proof to protect First Amendment values. See also Acosta v. Honda Motor Co., Ltd., 717 F.2d 828, 839 (3d Cir.1983) (imposing clear and convincing standard to recover punitive damages in a strict liability action under Virgin Islands law; consequences require "particularly careful scrutiny"). On the other hand, requiring a plaintiff to prove actual malice in itself represents a significant accommodation of the state's interest in punishing and deterring wrongful conduct to First Amendment values, even if a preponderance standard

is applied. In addition, the full measure of protection given the media in public figures cases may not be necessary when the state imposes restrictions on the amount of punitive damages, so that the dangers of the wholly uncontrolled and unpredictable awards cited by the Supreme Court are not present. See Pirre, 468 F.Supp. at 1040. As will be discussed below, under Pennsylvania law punitive damages must be reduced by the Court when they are so grossly excessive as to offend the Court's sense of justice.

While the Court continues to believe it was correct in charging on a preponderance of the evidence standard, this question need not be decided to dispose of the present case because the Court finds that the plaintiff has proved, by

clear and convincing evidence, that the defendant acted with reckless disregard of the truth or falsity of the defamatory statements it published concerning the plaintiff. While Gertz sets forth the burdens which the Constitution places on a private individual seeking to recover damages in a defamation action, Gertz does not require that a jury find that the plaintiff has made the Constitutionally-required showings. In Time, Inc. v. Firestone, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976), the Supreme Court was faced with a case involving a private individual in which no question of fault had been submitted to the jury. The Court stated:

> The failure to submit the question of fault to the jury does not of itself establish non-compliance with the constitutional requirements established in Gertz, however. Nothing in the Constitution requires that assessment of

> fault in a civil case tried in a state court be made by a jury, nor is there any prohibition against such a finding being made in the first instance by an appellate, rather than a trial, court. The First and Fourteenth Amendments do not impose upon the States any limitations as to how, within their own judicial systems, factfinding tasks shall be allocated. If we were satisfied that one of the Florida courts which considered this case had supportably ascertained petitioner was at fault, we would be required to affirm the judgment below.

424 U.S. at 461, 96 S.Ct. at 969. Although this discussion was dicta in light of the Court's ultimate determination that no adequate finding of fault had been made at any point, this Court is reluctant to reject reasoning set forth at such length in an opinion joined in by six Justices, particularly since this reasoning was not challenged in the concurring opinion or in either

dissenting opinion. It thus appears that this Court should look to the law of Pennsylvania for guidance on the respective roles of Court and jury in determining whether Constitutional requirements been met in a defamation action. The Supreme Court of Pennsylvania has squarely addressed this question in a public figure case, stating as follows:

> We do not agree, however, that the jury must be instructed that a public-figure plaintiff must prove "actual malice" by "clear and convincing" evidence rather than by a preponderance of the evidence. The United States Supreme Court said in New York Times Co. v. Sullivan, supra, 376 U.S. at 285-286, 84 S.Ct. at 729: "Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law." (Emphasis added). While the existence or absence of actual malice is a question of fact for the jury,

whether there is sufficient evidence in the case to warrant such a finding by the jury is a question of law for the court and is reviewable on appeal. See New York Times Co. v. Sullivan, supra, n. 26 at 285, 84 S.Ct. at 728. Thus the United States Supreme Court has said: "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. * * We must 'make an independent examination of the whole record,' * * * so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." New York Times Co. v. Sullivan, supra, at 285, 84 S.Ct. at 729. Therefore, in these statements, we believe that the United States Supreme Court was not addressing itself to the degree of proof with which the plaintiff must convince the jury but to the standard by which the court must review the evidence adduced to determine its sufficiency to warrant submission of the case to the jury without impairing defendant's constitutional rights. Contra, Goldwater v. Ginsburg, [414 F.2d 324 (2 Cir.1969)], supra.

Corabi v. Curtis Publishing Company, 441 Pa. 432, 456-57, 273 A.2d 899, 911-12

(1971) (footnote omitted) Corabi makes clear that under Pennsylvania law the Court may make the finding that the Constitutionally-imposed requirements of Gertz have been met. Time v. Firestone makes clear that such a procedure does not violate the Constitution. This Court, sitting in diversity, is required to apply Pennsylvania substantive law in this case. The right the defendant claims-the right to a new trial because the question whether the plaintiff has proved actual malice with convincing clarity was not presented to the jury-is quite simply a substantive right to which the defendant is not entitled under Pennsylvania law or the federal Constitution. Accordingly, this Court's finding that the plaintiff has proved actual malice by clear and convincing

evidence requires that we affirm the jury's finding that a sufficient predicate for an award of punitive damages has been shown in this case. See Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (plurality opinion) (jury awards punitive damages based on state law definition of malice; Supreme Court finds that New York Times standard should have been applied, but determines that evidence is sufficient to meet the Times standard and affirms). See also Bose Corp. v. Consumers Union of United States, Inc., 692 F.2d 189, 195 (1st Cir.1982), cert. granted, ___ U.S. ___, 103 S.Ct. 1872, 76 L.Ed.2d 805 (1983) (court must perform an independent de novo review of the record to ensure that the plaintiff has satisfied his burden of proving actual malice

by clear and convincing evidence, citing cases and authorities). Cf. Connick v. Myers, ___ U.S. ___, ___ n. 7, 103 S.Ct. 1684, 1690 n. 7, 75 L.Ed.2d 708 (1983) ("The inquiry into the protected status of speech is one of law, not fact").

It is not the position of this Court that the issue of whether the plaintiff has met the Constitutionally-imposed standards in a defamation action should not be given to the jury. We hold only that neither Pennsylvania law nor the Constitution requires a new trial in circumstances such as those of the present case in which the jury has found actual malice by a preponderance of the evidence and the Court has found the evidence sufficient to meet the Constitutional standards.

B. EVIDENCE OF ACTUAL MALICE

This Court must determine whether the plaintiff has sustained his burden of proving actual malice. We find that the plaintiff has met this burden both by a preponderance of the evidence and by clear and convincing evidence. As set out in this Court's earlier Memorandum, 533 F.Supp. at 355-56, the article at issue in this case began by describing a "new breed" of narcotics dealer, typically an attorney. The article then stated:

> However, even after DEA agents spent more than two years building an airtight case against a Mexican-American syndicate involved in the multi-million dollar, nationwide wholesaling of marijuana, federal judges did not sentence any of the attorney criminals to prison.
>
> Examples: . . .
>
> Frank Marcone, an attorney from the Philadelphia area, contributed down payments of up to $25,000 on grass transactions. Charges

> against him were dismissed because he cooperated with further investigations. . . .

The defendant's contention that the plaintiff failed to meet his burden of proving the falsity of the statements concerning him in the article borders on the frivolous. The plaintiff testified that he did not give any money for use in the purchase of drugs, did not cooperate with federal authorities, and had no reason to. (Marcone direct 20, 46, N.T. 3.25, 4.69-70). Although the plaintiff was indicted in federal court in Detroit for allegedly making a $25,000 drug payment, he provided a copy of a court record showing that this indictment was voluntarily dismissed. (P-5). The Assistant United States Attorney assigned to determine if the plaintiff should be

re-indicted in Philadelphia testified that the United States Attorney's office in this district determined that there was not sufficient evidence to warrant prosecution and no further action was taken against the plaintiff. (N.T. 5.10-11). The Assistant United States Attorney also stated that he was unaware of any cooperation by the plaintiff with federal authorities and that he knew of no basis for a statement that the charges were dismissed in Detroit in return for the plaintiff's cooperation. (N.T. 5.11, 5.26).

The evidence at trial showed that the following persons had some involvement with the defamatory article before publication: Ed Rasen, the author, Susan Bidel, a "senior research person" (N.T. 5.54) employed by Penthouse, who verified

factual data in the article, John Lombardi, a Penthouse editor who edited the piece, James Goode, Penthouse's editorial director who assisted in the editing and authorized publication, and Gerald Adler, Penthouse's general counsel, who also reviewed the article and authorized publication. (N.T. 2.25-26, 5.51-52, 5.89, 7.88). Messrs. Adler and Rasen and Ms. Bidel did not testify in this action. The deposition testimony of Messrs. Lombardi and Goode was provided, as was in-court testimony from Peter Block, a Penthouse editor who had no direct involvement with the story, and Clark Mollenhoff, a syndicated columnist, investigative reporter, and professor of journalism who was called by the defendant as an expert witness.

A copy of a draft of the article was

entered into evidence (P-2). This draft was used by the researcher, Ms. Bidel, who attached a short memo to the front of the draft informing Mr. Lombardi, the editor, that she had "underlined all the verified data, names, etc. and [had] gone over the material with Gerry Adler." Ms. Bidel's underlining of such verified data on a draft was standard procedure at Penthouse at the time this article was published. (N.T. 4.92, 5.60-62, 7.89 -92). The draft was the "final edited version", approved by Mr. Goode, the editorial director, "prior to checking." (N.T. 5.59). In this draft, none of the references to "attorney criminals" is underlined, nor is the statement that DEA agents built an airtight case against a Mexican-American drug syndicate but none of the "attorney criminals" went to pri-

son. The direct reference to the plaintiff appears as follows: "**Frank Marcone**, an attorney from the Philadelphia area, contributed down payments up to $25,000 toward shipments. **Charges were dismissed in favor of another indictment.**" (P-2 at 8). An asterisk appears next to the line containing the plaintiff's name; Mr. Block testified that this indicated that Ms. Bidel was working to obtain more information concerning the plaintiff. (N.T. 7.101). The Penthouse employees reviewing the draft thus had reason to know, in accordance with Penthouse's standard procedures, that despite Ms. Bidel's research efforts on this article, she had been unable to verify any of the defamatory statements ultimately published about the plaintiff, and that more information concerning the state-

ments was needed before publication. In addition, the evidence shows that the statement in the published article that the plaintiff cooperated with the Government, resulting in the dismissal of the charges against him, was not included in either of the drafts submitted into evidence. Neither Mr. Goode nor Mr. Lombardi knew how, when, where, or by whom this additional statement was added. (N.T. 5.59, 5.105).

The evidence shows that Penthouse had verified the information that the charges against the plaintiff were dismissed in favor of another indictment, yet the final published article stated positively that the plaintiff had committed the act for which he was charged. The added reference to cooperation, which does not

appear in either of the drafts submitted into evidence, clearly conveys the message to a reasonable reader that the plaintiff was an "attorney criminal" who contributed $25,000 to a drug transaction, and that charges againnst him were dismissed solely because of his cooperation and <u>not</u> because he was innocent of the charges. Mr. Goode and Mr. Lombardi stated that they had reason to believe the veracity of Mr. Rasen's information because of their previous experience with him and because of his reputation and background. However, both admitted that they were unaware that Mr. Rasen ws named as a co-defendant in the indictment which named the plaintiff. Furthermore, neither of the drafts presented in evidence at trial contains the statement that charges were dismissed because of

the plaintiff's cooperation. It became clear at trial that this statement was added to the author's material by one of the editors late in the editorial process; the editors' statements that they trusted Mr. Rasen are thus irrelevant with respect to this statement. The inference that the statement was added by one of the editors is strengthened by the fact that a list of corrections to the draft submitted by Mr. Rasen does not refer to any cooperation by the plaintiff or mention the plaintiff in any way. (P-2).

According to the evidence, the defendant relied on three sources in publishing the defamatory statements concerning the plaintiff: (1) Mr. Rasen's notes, (2) an article in the March 18, 1976 issue of the Philadelphia Inquirer,

Vol. 294, No. 78, at 1-A and 9-A, entitled "Delco Castle Linked To Largest U.S. Drug Case," and (3) the report of a hearing before a Senate Subcommittee on illicit Mexican-American drug traffic, **Illicit Traffic in Weapons and Drugs Across the United States-Mexican Border: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Gov't Operations**, 94th Cong., 1st Sess. at 24 (1977). Mr. Rasen's notes were not produced at trial and Mr. Lombardi, the editor of the article, had no recollection as to what Mr. Rasen's notes contained concerning the plaintiff. (N.T. 5.97). The other two sources cited provide no basis for the defamatory statements, and indeed show that the defendant had reason to know that those statements were false.

The Inquirer article referred to the indictment and set forth the charges against the plaintiff. It also stated that the plaintiff and three other Philadelphia-area men named in the indictment frequented "the Castle", a building in Delaware County, and that the plaintiff was a "close associate" of the Castle's owner. The Castle was stated to have been the subject of a number of law enforcement investigations, including one into the disappearances of five women, four of whom were found murdered. The article stated that several persons linked to the Castle had been arrested in the past on drug charges, but that federal authorities had no information that the drugs mentioned in the indictment went to the Castle. Finally, the article stated that the plaintiff "was

once quoted" as saying that he occasionally went on weekend trips with a motorcycle gang known as the Warlocks, and stated that he had frequently represented them in legal proceedings.

The Inquirer article said nothing about the plaintiff's guilt with respect to the charges in the Detroit indictment and of course said nothing about any cooperation by him with federal authorities. The article stated only that the defendant had been indicted in connection with a drug transaction. An indictment affords no inference of guilt, nor does it affect the presumption given every citizen under our Constitution that he is innocent of charges brought against him until such time, if ever, that his guilt is proved beyond a reasonable doubt. The law is clear that a report that a person

has been indicted or otherwise charged with an offense may not state that the accused committed the crime, or comment upon or infer his probable guilt. See Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir.1980); Commercial Publishing Co. v. Smith, 149 F.704, 706 (6th Cir.1907); Piracci v. Hearst Corp., 263 F.Supp. 511, 514 (D.Md.1966), aff'd 371 F.2d 1016 (4th Cir.1967). The Inquirer article thus provides no justification for the publication of those statements found to have defamed the plaintiff by referring to him as an attorney criminal who financed a drug transaction and avoided jail by cooperating with federal authorities.

The information in the Senate report upon which the defendant claimed reliance was supplied to a Senate Subcommittee by

the Drug Enforcement Administration. The Senate report listed the disposition of drug conspiracy charges against a number of persons. The portion of this report upon which the defendant claimed reliance reads as follows:

> Defendant: Frederick Frey (Class III).
> Maximum sentence: 5 years.
> Actual sentence: 1 year suspended sentence; 2 years special parole.
> Defendant: Richard Litner (Class III).
> Maximum sentence: 5 years.
> Actual sentence: 1 year probation.
> Defendant: Richard S. MacKenzie (Class III).
> Maximum sentence: 5 years.
> Actual sentence: $1,000 fine.
> Defendant: Samuel T. Arnold (Class III).
> Maximum sentence: 5 years.
> Actual sentence: To plead guilty in Rhode Island on misdemeanor under Rule 20.
> Defendant: Charles S. Hewett (Class I).[1]

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[1]Defendants sentence reduced at the request of the U.S. Attorney's Office due to cooperation.

Maximum sentence: 5 years.
Actual sentence: Dismissed at request of Government due to cooperation.
Defendant: Blanca Reid (Class III).
Maximum sentence: 5 years.
Actual sentence: Dismissed in interest of Justice.
Defendant: Frank Marcone (Class III).
Maximum sentence: 5 years.
Actual sentence: Dismissed (to be reindicted in Philadelphia).
Defendant: Michael Hearn (Class III).
Maximum sentence: 5 years.
Actual sentence: Dismissed (to be reindicted in Philadelpia).

Hearing Report at 24. The Report states that as to the plaintiff charges were dismissed "to be reindicted in Philadelphia." Footnote one, referring to cooperation, is clearly applicable only to Charles S. Hewett; the Court does not believe that anyone could read this footnote as referring to the plaintiff.

None of the three bases relied on by the defendant in publishing the statements concerning the plaintiff, and presented to the jury as proving the truth of those statements (opening statements at 31-32), provided the jury, or Penthouse, any basis whatsoever for finding that the statements were in fact true. To the contrary, the evidence gave a clear indication that there was no basis whatsoever for making the false statements. Publishing the defamatory statements with such a clear indication of falsity, under the circumstances presented to the jury, clearly and convincingly shows actual malice as that term has been defined in New York Times and its progeny.

The defendant contends in its post-trial memorandum, at 43-44, that "[i]f a

footnote in the Congressional report was misread by the checker, editor, or even the attorney, and the statement in Rasen's draft changed out of a desire to insure total accuracy, that was at worst a mistake due to carelessness or negligence," and does not show actual malice or outrageous conduct. The problem with this argument is that there is no evidence in the record that the change was due to an innocent mistake. On the contrary, the evidence in this case convincingly supports a finding that the change was consciously made by someone on the editorial staff of Penthouse for the purpose of supporting the article's contention that there are "attorney criminals" involved in drug transactions who are not sent to prison by federal judges.

Finally, the Court should note that it found the opinion testimony of Professor Mollenhoff, the defendant's expert witness, unpersuasive; so, too, apparently, did the jury. Professor Mollenhoff stated his opinion that the defendant's conduct was "quite responsible." (N.T. 7.162). Professor Mollenhoff placed great weight on the defendant's supposed reliance on a Senate report (N.T. 7.132, 7.163) without any apparent awareness that the Senate report in this case did not support the statements made concerning the plaintiff. Professor Mollenhoff also stated that checking the indictment itself is desirable but may not be possible for a publisher under a deadline; he then admitted that he did not know what time constraints Penthouse might have been under in this particular

case. (N.T. 7.167-68).

Professor Mullenhoff did state than an investigative reporter must have a knowledge of public records and that magazine publishers should make sure that there are "public records to support the major thrust of material." (N.T. 7.131-32). Similarly, Mr. Goode testified in his deposition that a researcher has a "total obligation" to verify factual matter "by all available printed sources." (N.T. 4.94, 5.62). These standards were ignored in this case.

Publication of the defamatory material in this case, with no apparent basis for it, and in light of the fact that the defendant had information of which it was aware which cast serious doubt on its accuracy, clearly and convincingly demonstrates reckless disregard for the truth

or falsity of the statements and supports the jury's finding that this conduct was outrageous. This is not a case where an editor or publisher simply relied on the statement of a credible author without checking that information; rather, the defendant had absolutely no reason to believe that the defamatory information which did not come from the author was true, and, because the dismissal of the indictment in favor of another indictment had been verified, had reason to believe the defamatory statements were false. Accordingly, this Court finds, as did the jury, that the plaintiff made a showing sufficient to support an award of punitive damages. See Davis v. Schuchat, 510 F.2d 731, 735-36 (D.C. Cir.1975) (actual malice found where the defendant claimed that his knowledge that the appellant and

other officials had been indicted for perjury and fraud allowed him to form a good faith belief that they had been convicted of some crime); Corabi v. Curtis Publishing Co., 441 Pa. at 466, 273 A.2d at 916 (conscious editing decisions to comport with desired tone of a magazine help support a finding of actual malice).

C. EVIDENCE OF ACTUAL INJURY

The defendant contends that no competent evidence was presented to support the jury's award of compensatory damages and that this award must be stricken. This contention is without merit. The Court believes that the plaintiff did present evidence of actual injury and that this evidence was sufficient to support the jury's award of compensatory damages in the amount of $30,000.

Under Pennsylvania law, a defamation plaintiff may recover damages for injury to reputation, for any special harm he may have suffered, and for emotional distress or bodily harm. Corabi v. Curtis Publishing Co., 441 Pa. at 473, 273 A.2d at 919-20; Montgomery v. Dennison, 363 Pa. 255, 267-68, 69 A.2d 520, 527 (1949) (citing Restatement of Torts §§621-623). Gertz, as stated above, requires that compensatory awards be supported by competent evidence of actual injury.

The plaintiff testified that he was frustrated, distraught, upset and distressed about the article and its effect on his family and friends, in that it revived the charges which he thought had been laid to rest two years previously and made him appear untruthful in pro-

fessing his innocence of those charges. He also testified that he feared retribution against his family by clients who imagined themselves the victims of his alleged cooperation. (Marcone direct 49-61). This Court is not free to overturn the jury's apparent finding that this testimony was credible, regardless of the alleged inconsistencies in other matters of the plaintiff's testimony to which the defendant has pointed us. Credibility questions are for the jury. The plaintiff's testimony was buttressed by that of several witnesses who were acquainted with him at the time of the publication and who testified that he appeared upset by the article. (N.T. 6.70, 6.155, 6.165).

The plaintiff also presented testimony that he lost clients because of the

article and other attorneys testified that they received clients who, as a result of the article, were concerned about being represented by the plaintiff. This testimony was admissible to show damage to the plaintiff's business reputation and its resulting effect on the plaintiff. See Meehan v. Snow, 494 F.Supp. 690, 696 (S.D.N.Y.1980), rev'd on other grounds, 652 F.2d 274 (2d Cir.1981). Witnesses also testified that the article affected their view of the plaintiff's reputation. (N.T. 6.96, 6.108, 6.158). The defendant presented a great deal of evidence in an attempt to show that the plaintiff's reputation was so poor that it could not have been damaged further by the defamatory article. This included evidence that the indictment had been widely reported, as

had been the ties of the plaintiff to the "Castle" and to a motorcycle club reportedly involved in criminal activities. The defendant also presented reports that the plaintiff had been indicted for income tax evasion, the trial apparently ending in a hung jury (N.T. 3.147-51), reports that he was fined $200 for assault and battery on a police officer (N.T. 3.104-05), and reports that he had been fined twice for contempt of court. (N.T. 3.134-43). The first contempt citation was in 1966. The second was late in 1979, after the publication of the article at issue in this case, and the judge who imposed the fine severely criticized the plaintiff, according to a newspaper account of the indictment.

The defendant claims that the effect

of this material was to destroy the plaintiff's reputation so thoroughly that no further damage to his reputation was possible at the time of publication. See Cardillo v. Doubleday & Co., Inc., 518 F.2d 638 (2d Cir.1974) (habitual criminal is "libel proof"); Ray v. Time, Inc., 452 F.Supp. 618 (W.D.Tenn.1978) (convicted assassin of Martin Luther King is "libel proof"). Although the evidence provided by the defendant showed that the plaintiff's reputation in the community may have been less than unblemished, there is no question that the plaintiff's reputation could have suffered from a false charge that he participated in a drug conspiracy. Accordingly, the Court does not believe that the plaintiff should have been precluded as a matter of law from offering testimony that the article

damaged his reputation. See Buckley v. Littel, 539 F.2d 882, 889 (2d Cir.1976), cert. denied, 429 U.S. 1062, 97 S.Ct. 785, 50 L.Ed.2d 777 (1977) (Cardillo "libel proof" doctrine is a narrow, limited one). See also Wolston v. Readers Digest Assn., Inc., 443 U.S. 157, 169, 99 S.Ct. 2701, 2708, 61 L.Ed.2d 450 (1979) (Court refuses to "declare 'open season' for all who [seek] to defame persons convicted of a crime").

The defendant contends that the plaintiff failed to provide sufficient evidence that special harm resulted from the publication of the libel, and that this requires entry of judgment against the plaintiff. As the Court stated in its earlier Memorandum, 533 F.Supp. at 358, 361, the defamatory statements at issue impute to the plaintiff the com-

mission of an indictable crime, and they are therefore actionable as libel per se and do not require proof of special harm, that is, harm of a pecuniary nature. See Paul v. Davis, 424 U.S. 693, 697, 96 S.Ct. 1155, 1159, 47 L.Ed.2d 405 (1976) ("Imputing criminal behavior to an individual is generally considered defamatory per se, and actionable without proof of special damages."); Altoona Clay Products Inc. v. Dun & Bradstreet, Inc., 367 F.2d 625, 628 (3d Cir.1966) (reserving the question whether all libels are actionable per se in Pennsylvania). See also Brown & Williamson Tobacco Corp. v. Jacobson, 713 F.2d 262, 267-68 (7th Cir.1983) (noting two different meanings of libel per se, one referring to the need for extrinsic facts and the other assimilating the traditional categories

of slander per se; Pennsylvania apparently adopts the latter approach).

Gertz does not require that a plaintiff prove special harm, that is, pecuniary loss, as the term has been defined in the Pennsylvania cases. Where liability is based solely on fault, Gertz requires proof by competent evidence of "actual injury", which includes "impairment of reputation in the community, personal humiliation, mental anguish and suffering." 418 U.S. at 349-50, 94 S.Ct. at 3012. See Time, Inc. v. Firestone, 424 U.S. at 459-60, 96 S.Ct. at 968 (affirming $100,000 award for the plaintiff's anxiety over defamatory article and her fear that it would adversely affect her young son; no claim for damage to reputation); Gertz II, 680 F.2d at 540 (affirming award of $100,000 for severe

mental distress, anxiety, embarrassment, and injury to professional reputation). Gertz therefore does not eliminate the significance of classifying a libel as libel per se. Wachs v. Winter, 569 F.Supp. 1438, 1446 (E.D.N.Y.1983); R. Sack, Libel, Slander and Related Problems 110-111 (1980). If a libel is libel per se, a plaintiff must prove only actual injury as broadly defined by Gertz; he need not prove special harm. Although the jury was instructed in this case that the plaintiff was required to prove special harm, this error could not have prejudiced the defendant, since it merely imposed an unnecessary burden upon the plaintiff, particularly in light of the jury's finding of actual malice.

Finally, since in this case the plaintiff proved that the defendant published

the defamatory material with actual malice, he was not prevented by the Supreme Court's Gertz decision from recovering "presumed damages", that is, damages awarded in the absence of proof of injury as compensation for the injury presumed to be the normal result of a defamatory publication. Gertz II, 680 F.2d at 540. Since Pennsylvania law appears to provide for the recovery of such "presumed damages," Corabi, 441 Pa. at 473, 273 A.2d at 919-20; Montgomery, 363 Pa. at 267-68, 69 A.2d at 527, the finding of actual malice in this case appears to have absolved the plaintiff of the requirement that he have presented proof of actual injury. A finding that the plaintiff was entitled to "presumed damages" is not necessary to support the jury's award of compensatory damages,

however, since, as stated above, the plaintiff provided sufficient competent evidence to support that award.

D. AMOUNT OF THE PUNITIVE DAMAGES AWARD

The defendant contends that the punitive damages award in this case of $537,500, almost eighteen times the compensatory damage award, is excessive because it bears no reasonable relationship to the compensatory damages awarded and reflects passion and prejudice on the part of the jury. At the time of trial it was clear that Pennsylvania law required punitive damages to be proportionate or reasonably related to the amount of compensatory damages, Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1279 (3d Cir.1979); Neal v. Carey Canadian Mines, Ltd., 548 F.Supp.

357, 377 (E.D.Pa.1982), and the jury was so instructed. Several recent decisions of the Pennsylvania Superior Court have cast some doubt on whether the proportionality or reasonable relationship requirement is still a part of Pennsylvania law. See Rhoads v. Heberling, 306 Pa.Super. 35, 451 A.2d 1378 (1982) (no error where jury charge does not include reasonable relationship language); Feld v. Merriam, ___ Pa.Super. ___, 461 A.2d 225 (1983) (reasonable relationship required), petition for allowance of appeal granted (September 2, 1983); Daley v. John Wanamaker, Inc., ___ Pa.Super. ___, 464 A.2d 355 (1983) (court does not explicitly take a position on the question). Since the jury instruction in this case included reasonable relationship language, the suggestion that

Pennsylvania law no longer requires a reasonable relationship between punitive and compensatory damages does not present a ground for a new trial, since the charge was favorable to the defendant and could not have caused it prejudice.

Regardless of the current state of Pennsylvania law with respect to charging the jury that there must be a reasonable relationship of punitive damages to compensatory damages, Pennsylvania law clearly provides that a trial court has the authority to order a remittitur of damages when the trial judge is convinced that the damages are so excessive as to shock his sense of justice. Daley, ___ Pa.Super. at ___, 464 A.2d at 357; See Murray v. Fairbanks Morse, 610 F.2d 149, 152-53 (3d Cir.1979); Curtis Publishing Co. v. Butts, 351 F.2d 702, 717-19 (5th

Cir.1965), aff'd 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (affirming remittitur of punitive damages from $3,000,000 to $400,000); Marder v. Conwed Corp., 75 F.R.D. 48 (E.D.Pa.1977). A court must recognize, however, that the award of punitive damages is generally a matter within the province of the jury, and that the jury's award should not be disturbed unless it is so grossly excessive as to offend the conscience of the Court and to shock its sense of justice. Daley, ___ Pa.Super. at ___, 464 A.2d at 358-59; Murray, 610 F.2d at 152-53.

The punitive damages award in this case was so grossly excessive as to shock the conscience of this Court. First, the award is almost eighteen times the compensatory damage award of $30,000, which compensatory damage award was, in the

Court's view as well as the jury's, an adequate reflection of the harm inflicted by the defendant. Although, as heretofore pointed out, the Pennsylvania law appears to be in a state of change as to whether punitive damages must be proportionate or reasonably related to compensatory damages, the absence of any kind of reasonable relationship in this case is certainly a factor which the Court may take into consideration in determining that the award is excessive. In addition, there was no evidence that the defendant was engaged in sustained harmful activity against the plaintiff, which could require the imposition of a large award to insure that the conduct cease. The purpose of punitive damages is to punish wrongful conduct and to deter its repetition. There is no question that

punitive damages of an amount less than $537,500 will sufficiently fulfill this purpose. The Court cannot agree with the defendant, however, that the entire punitive damages award must be stricken as the product of passion and prejudice. The defendant has not pointed to any basis, o her than the amount of the award, for a finding that the jury was impassioned or prejudiced. Although the Court does feel that the award was excessive, the excessiveness appears attributable to excessive outrage over the total lack of regard for the rights of the plaintiff which the defendant exhibited in this matter.

The Court is aware that it may not reduce a damages award simply because it may, as a factfinder, have awarded a different amount. Daley, ___ Pa.Super. at

___, 464 A.2d at 359; Murray, 610 F.2d at 152. The Court's role is merely to insure that the award does not shock the sense of justice or offend the conscience. Based on the findings that the defendant engaged in outrageous conduct and published the article with knowledge of its falsity or reckless disregard of its truth or falsity and based on the other evidence in this case, a punitive damages award of $200,000 would not shock the Court's sense of justice. We note that this award would still be over six times the amount of the compensatory damages awarded. See Chuy, 575 F.2d at 1279 (affirming punitive award of six times the compensatory award); Montgomery v. Dennison, 363 Pa. at 269, 69 A.2d at 527-28 (affirming reduction of punitive award from $5,000 to $2,500); Burnett v.

National Enquirer, Inc., 144 Cal.App.3d 991, 193 Cal.Rptr. 206 (1983), petition for review denied, 52 U.S.L.W. 2236 (Cal. October 6, 1983) ($1.3 million jury award reduced to $750,000 by trial court and to $150,000 by appellate court).

The defendant's motion for a new trial will therefore be granted, unless the plaintiff shall, within twenty days of the date of the Order accompanying this Memorandum, file a remittitur for the amount of the punitive damages award in excess of $200,000. The amount of the compensatory damages award is to remain undisturbed. The defendant's motion for judgment notwithstanding the verdict will, for all of the reasons stated in this Memorandum, be denied. An Order follows.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK MARCONE	:	
	:	CIVIL ACTION
v.	:	NO. 78-3733
	:	
PENTHOUSE INTERNATIONAL, LTD.	:	
and	:	
EDWARD RASEN	:	

ORDER

AND NOW, this 17th day of November, 1983, upon consideration of the defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, and the plaintiff's opposition thereto, for the reasons stated in this Court's Memorandum of November 17, 1983,

IT IS HEREBY ORDERED:

1. The defendant's motion for judgment notwithstanding the verdict is

DENIED.

2. The defendant's motion for a new trial is GRANTED, unless the plaintiff shall, within twenty days of the date of this Order, state in a writing filed with the Clerk of the United States District Court for the Eastern District of Pennsylvania that he consents to a remittitur of the punitive damages awarded above the sum of $200,000; the award for compensatory damages in the amount of $30,000 to remain undisturbed. In the event the plaintiff files such a remittitur, the defendant's motion for a new trial is DENIED, and the judgment entered on July 19, 1982 is AMENDED so that "the sum of FIVE HUNDRED SIXTY-SEVEN THOUSAND FIVE HUNDRED DOLLARS ($567,500)" reads "the sum of TWO HUNDRED THIRTY THOUSAND DOLLARS ($230,000)", and the judgment

shall read "IT IS ORDERED that judgment be and the same is hereby entered in favor of the plaintiff, FRANK J. MARCONE, and against the defendant, PENTHOUSE INTERNATIONAL, LTD., in the sum of TWO HUNDRED THIRTY THOUSAND DOLLARS ($230,000)."

Raymond J. Broderick, J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK MARCONE	:	
	:	CIVIL ACTION
v.	:	NO. 78-3733
	:	
PENTHOUSE	:	
INTERNATIONAL, LTD.	:	
and	:	
EDWARD RASEN	:	

ON MOTION FOR RECONSIDERATION

BRODERICK, J. December 14, 1983

The plaintiff has moved for reconsideration of this Court's Order of November 17, 1983 granting the defendant's motion for a new trial unless the plaintiff consents to a remittitur of the punitive damages awarded by the jury in excess of $200,000. The Order also states that in the event the plaintiff files such a remittitur, the motion for new trial is denied. The plaintiff asks

the Court to reconsider its Order of a remittitur or, in the alternative, to condition the grant of a new trial on a remittitur of a lesser amount. The plaintiff also asks for clarification of whether the Court intended the new trial to be on all issues or just on the issue of punitive damages, and contends that any new trial should be limited to a determination of the amount of punitive damages to be awarded. The defendant has opposed the motion for reconsideration.

The Court has reconsidered its decision to grant a remittitur in this case and finds that the plaintiff has presented no reasons for the Court to change its decision. The Court carefully considered the question of remittitur in its earlier Memorandum, at 334-336, and set forth in detail its reasons for granting

the remittitur. The Court also set forth in detail the applicable law and does not consider it necessary to restate its reasons for granting the remittitur.

The plaintiff in his motion for reconsideration directs the Court's attention to Rosenbloom v. Metromedia, Inc., 289 F.Supp. 737 (E.D.Pa.1968), rev'd 415 F.2d 892 (3d Cir.1969), aff'd 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), and Thomas v. E.J. Korvette, Inc., 329 F.Supp. 1163 (E.D.Pa.1971), rev'd 476 F.2d 471 (3d Cir.1973). In each of these cases, substantial punitive damages remittiturs were granted, and in our analysis both cases support the grant of a remittitur in the present case.

There remains the question of the scope of the retrial. A new trial following a remittitur may be partial or

full. 6A J. Moore, Moore's Federal Practice ¶59.08[6] at 59-158, ¶59.08[7] at 59-193. The question whether the retrial should be on all issues or only on damages issues is addressed to the discretion of the trial judge. Cosentino v. Royal Netherlands Steamship Co., 389 F.2d 726 (2d Cir.), cert. denied, 393 U.S. 977, 89 S.Ct. 441, 21 L.Ed.2d 438 (1968) (new trial on all issues following reduction of compensatory damages award); See Stanton v. Astra Pharmaceutical Products, Inc., 718 F.2d 553, 576 n. 42 (3d Cir.1983) ("scope of review in determining the propriety of an order granting only a partial retrial is whether the district court abused its discretion in so ruling").

The general rule as to when a partial retrial may be ordered has been stated by

the Supreme Court in Gasoline Products Co., Inc. v. Champlin Refining Co., 283 U.S. 494, 500, 51 S.Ct. 513, 515, 75 L.Ed. 1188 (1931):

> Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.

The Third Circuit has recently applied this standard to reverse the award of a partial new trial where evidence of a compromise verdict was present. Stanton, 718 F.2d at 576-78. See Heckman v. Federal Press Co., 587 F.2d 612, 619 (3d Cir. 1978) (applying standard and ordering a new trial on both liability and compensatory damages issues). The Circuit also cited Gasoline Products in an older decision declining to award a

partial retrial, as opposed to a full retrial, after reversal of an award of punitive damages. Smyth Sales v. Petroleum Heat & Power Co., 141 F.2d 41 (3d Cir.1944). In Smyth Sales, Judge Maris, writing for the panel, stated the following:

> It is apparent, therefore, that the determination of the amount of punitive damages, if any, to be awarded under the Connecticut law cannot appropriately take place except in connection with the consideration by the jury of the whole question of the defendant's liability and of all the circumstances which it is asserted give rise to that liability. It would, therefore, be inappropriate for us under these circumstances to direct what under other circumstances we might well be inclined to order, namely, a new trial of the issue of damages only. Gasoline Prods. Co. v. Champlin Refining Co., 1931, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188.

141 F.2d at 45. See Atlantic Coast Line Railroad Co. v. Bennett, 251 F.2d 934,

939 (4th Cir.1958) (reads Smyth to say that determination of puniive damages requires "consideration by the jury of the whole case;" orders new trial on all issues should the plaintiff decline a punitive damages remittitur): See also Fury Imports, Inc. v. Shakespeare Co., 554 F.2d 1376, 1389 (5th Cir.1977), cert. denied, 450 U.S. 921, 101 S.Ct. 1369, 67 L.Ed.2d 349 (1981) ("an award of punitive damages should rest on the jury's assessment of all the evidence in the case;" retrial on all issues ordered). Several recent cases have held that when a new trial is conditioned upon the plaintiff's acceptance of a punitive damages remittitur, the new trial should be on all issues because the issue of punitive damages is intertwined with the liability issues and a partial retrial

would create confusion and uncertainty. See Malandris v. Merrill Lynch, Pierce, Fenner & Smith, 703 F.2d 1152, 1178 (10th Cir.1981); Slater v. KFC Corp., 621 F.2d 932, 938 (8th Cir.1980); Alley v. Gubser Development Corp., 569 F.Supp. 36, 41 (D.Colo.1983).

The Court is, however, aware of several recent cases from other jurisdictions granting a remittitur of punitive damages with the resulting new trial, upon decline of the remittitur, to be limited solely to the amount of punitive damages. See Spaeth v. Union Oil Co. of California, 710 F.2d 1455, 1460 (10th Cir.1983); Brink's Inc. v. City of New York, 546 F.Supp. 403, 415 (S.D.N.Y. 1982), aff'd, 717 F.2d 700 (2d Cir.1983); Rosenbloom, 289 F.Supp. at 749; Rosener v. Sears, Roebuck & Co., 110 Cal.App.3d

740, 168 Cal.Rptr. 237 (1980). Although none of these cases has set forth in detail the rationale for ordering a partial new trial, it is apparent that considerations of economy and efficiency, as well as fairness to the verdict winner, provide strong justification for the grant of a partial new trial in appropriate circumstances. See, e.g., Brink's Inc., 546 F.Supp. at 415 (court notes that first trial was long and fully addressed the issues). As stated in Yates v. Dann, 11 F.R.D. 386, 392-93 (D.Del.1951):

> The theory behind [Fed.R.Civ.P. 59 is that] a party who has already had his day in court as to a particular issue may not have another opportunity to relitigate the same point unless a partial new trial will result in a miscarriage of justice. I think F.R. 59 was intended to prevent the retrial of any issue already properly decided, and to limit any new trial only to those issues which are incorrectly decided or not decided at all.

If an issue has been fairly and fully tried, it should not, in fairness to the verdict winner, be retried unless its retrial is necessary because of its relationship to the issues requiring retrial. The determination as to the scope of a retrial cannot be made solely by reference to a general rule, but requires examination of the circumstances of the particular case.

In the present case, the issue of the punitive damages to be awarded upon a retrial cannot be separated from the question whether the defendant acted with actual malice, that is, with knowledge of the falsity of the statements concerning the plaintiff or with reckless disregard of their truth or falsity. The issue of the existence of actual malice will therefore be resubmitted to the jury upon

retrial should the plaintiff decline to accept the punitive damages remittitur.

The Court believes, however, that the questions of negligence and the amount of compensatory damages should not be resubmitted to the jury upon retrial. The Court believes that these questions were fully and fairly decided by the jury. There is no hint that the jury's findings on these questions were the result of compromise and the Court does not believe that these findings were the result of passion or prejudice or influenced by the excessive amount of punitive damages awarded. Further, no injustice to the defendant will result if the issues of negligence and compensatory damages are not resubmitted to the jury. All of the circumstances concerning the existence or absence of actual malice will be before the jury at retrial, since it is neces-

sary that the jury have this evidence in determining whether punitive damages should be awarded and, if so, the amount of the punitive damages. The jury may also be instructed as to the amount of the compensatory award, so that it is able to take this amount into consideration in determining the amount of punitive damages, to the extent this remains a relevant consideration in the award of punitive damages under Pennsylvania law. The jury will therefore have before it all of the factual circumstances relevant to a determination of punitive damages.

The Court will therefore enter an order granting the plaintiff until December 21, 1983 to file a writing with the Court that he consents to remittitur of the punitive damages awarded by the jury in excess of $200,00; otherwise, a

new trial will be granted as to whether the defendant acted with actual malice and, if so, the amount of punitive damages, if any, to be awarded. The jury's findings that the defendant acted negligently and that the plaintiff is entitled to compensatory damages of $30,000 shall remain undisturbed.

The Order follows.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK MARCONE	:	
	:	CIVIL ACTION
v.	:	NO. 7[illegible]3733
	:	
PENTHOUSE INTERNATIONAL, LTD. and EDWARD RASEN	:	

ORDER

AND NOW, this 14th day of December, 1983, upon consideration of the plaintiff's motion to alter or amend the Order of the Court of November 17, 1983, and to stay proceedings, and the defendant's response thereto, for the reasons stated in this Court's Memorandum of December 14, 1983,

IT IS HEREBY ORDERED:

1. Paragraph 2 of this Court's Order of November 17, 1983 is VACATED.

2. The defendant's motion for a new trial is GRANTED, with the new trial limited to the issues of the existence of actual malice and the amount of any punitive damages to be awarded, unless the plaintiff shall, on or before December 21, 1983, state in a writing filed with the Court that he consents to a remittitur of the punitive damages awarded above the sum of $200,000; the award of compensatory damages in the amount of $30,000 to remain undisturbed. In the event that plaintiff files such a remittitur, the defendant's motion for a new trial is DENIED, and the judgment entered on July 19, 1982 is AMENDED so that "the sum of FIVE HUNDRED SIXTY-SEVEN THOUSAND FIVE HUNDRED DOLLARS ($567,500)" reads "the sum of TWO HUNDRED THIRTY THOUSAND DOLLARS ($230,000)", and the judgment

shall read "IT IS ORDERED that judgment be and the same is hereby entered in favor of the plaintiff, FRANK J. MARCONE, and against the defendant, PENTHOUSE INTERNATIONAL, LTD., in the sum of TWO HUNDRED THIRTY THOUSAND DOLLARS ($230,000)."

Raymond J. Broderick, J.

(3)

No. 84-1869

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK J. MARCONE,

Petitioner,

—vs.—

PENTHOUSE INTERNATIONAL, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK J. MARCONE,

Petitioner,

—vs.—

PENTHOUSE INTERNATIONAL, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Penthouse International, Ltd. ("Penthouse") respectfully requests that this Court deny the petition for a writ of certiorari filed by petitioner Frank J. Marcone to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

REASONS FOR DENYING THE WRIT

I.

THE PROCEDURAL ISSUES COMPLAINED OF BY PETITIONER WERE WAIVED, AND PETITIONER MISCHARACTERIZES THE OPINION OF THE COURT OF APPEALS IN ORDER TO RAISE "IMPORTANT QUESTIONS" WHICH WERE NOT PART OF THE DECISION BELOW

Petitioner urges that the Court of Appeals decided that he was a limited purpose public figure on the basis of inadmissible

hearsay evidence, that he was deprived of a right to jury trial on disputed issues of fact concerning his public figure status and that the burden of proving that status was incorrectly placed upon him.

As demonstrated below, however, petitioner deliberately misreads the Court of Appeals decision in an effort to frame important legal questions for review by this Court which do not arise at all in this case. In any event, petitioner failed to preserve his right to complain about these procedural matters—which are being raised for the first time here—since he did not raise these arguments to either the District Court or the Court of Appeals. In short, based on the record, this case does not present an appropriate occasion for this Court to consider questions relating to the method of proof, the burden of proof or the right to a jury trial concerning plaintiff's status as a public figure.

A. Petitioner Waived the Right to Contest These Procedural Matters

Petitioner failed to preserve any objection with respect to the burden of proof on the public figure question, the use of alleged hearsay evidence or the right to a jury trial on disputed factual issues related to his public figure status.

Although the District Court determined prior to the time of trial that Marcone was a private figure, it repeatedly emphasized that its decision was made "on the basis of the present record." (App. at 65). Petitioner was therefore fully aware that his public figure status was still a critical issue which Penthouse would press on appeal, and the District Court's own limitation to the facts then before it invited Penthouse to more fully develop the factual record at trial regarding the public figure issue.

But in opposing Penthouse's motion for summary judgment before the District Court, Marcone never objected to the use of newspaper articles on the ground of hearsay. Moreover, in his brief opposing Penthouse's appeal to the Third Circuit, Mar-

cone failed to argue that the record contained inadmissible hearsay and he never raised the issues concerning burden of proof and right to a jury trial belatedly urged for the first time before this Court.[1]

It is submitted that petitioner waived these procedural arguments by not preserving them below. Even if petitioner contends that these procedural issues rise to a level of constitutional magnitude, "it is equally clear that even constitutional objections may be waived by a failure to raise them at a proper time . . ." *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 143 (1967); *Michel v. Louisiana,* 350 U.S. 91, 99 (1955). It would be particularly inappropriate for this Court to exercise its discretion to decide what petitioner characterizes as "important questions" on the basis of a record totally undeveloped and devoid of any analysis by the parties or the lower courts addressing these issues. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 37 (1976) (it was inappropriate to review the statutory and constitutional questions raised, "[p]articularly in the absence of any mention of the regulations in the opinion and judgment of the District Court, or in the briefs and oral arguments of the parties, . . ."); *Accardi v. Pennsylvania Railroad Co.*, 383 U.S. 225, 233 (1966) ("The record before us does not present that question with sufficient clarity for us to pass upon it"); *Public Affairs Associates, Inc. v. Rickover,* 369 U.S. 111, 113 (1962) ("Adjudication of such problems . . . should rest on an adequate and full-bodied record. The record before us is woefully lacking in these requirements.").

B. The Court of Appeals Did Not Shift the Burden of Proving Public Figure Status From the Defendant to the Plaintiff

The burden of proof issue is a straw man raised by the petitioner in order to attract the Court's attention to an

---

1 In the public figure section of his brief to the Third Circuit (p. 14), Marcone did note the "litany of news articles" received in evidence, but did not object to consideration of those articles on the ground of hearsay.

unresolved procedural question of importance. But while the question may be interesting, it has no bearing upon this case. The legal question of allocating the burden of proving plaintiff a public figure is not at issue since there is nothing in the decision of the Court of Appeals to suggest that it relieved defendant of the burden of proof and shifted it to the plaintiff. Indeed, it would be anomalous for the Court of Appeals to have done so, since the burden of proving the facts giving rise to a privilege invariably rests upon the party asserting the privilege—in this case the defendants. Petitioner fails to point out any language in the Court of Appeals opinion to support his contention that the burden was placed upon him. What he actually does is to argue that his interpretation of the evidence warrants a different result. Certainly, this Court should not be called upon simply to decide whether the evidence in this case was sufficient to support the Court of Appeals' determination that plaintiff was a limited purpose public figure.

C. Plaintiff's Public Figure Status Was Not Decided on the Basis of Hearsay

The flaw in petitioner's argument is that the newspaper articles relied upon by the Court of Appeals do not constitute hearsay, because they were not used for the truth of the statements contained therein, but rather for the general notoriety and attention attracted by Marcone in the limited context of illicit drug trafficking. See, e.g., *Rebozo v. The Washington Post Company*, 637 F.2d 375 (5th Cir. 1981); *Waldbaum v. Fairchild Publications, Inc.* 627 F.2d 1287 (D.C. Cir. 1980); *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978). These cases as well as many others establish that the public perception of the fame of a libel plaintiff, as reflected in media reports, constitutes appropriate evidence to support a determination that he is a public figure.[2] In fact, it is almost impossible to prove public figure status without the use of media reports.

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2 A person may be "drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz v. Welch, Inc.*, 418 U.S. 323, 351 (1974).

Significantly, in the libel cases previously decided by this Court, precisely the same kind of evidence has been considered as to public figure status, *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157, 162-63 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 134 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 484 (1976) (Marshall, J., dissenting). While each of those cases ultimately held the plaintiff to be a private figure, this Court's discussion of and consideration of media reports indicates that such proof was appropriately received on the public figure issue, whatever the outcome. For example, in *Wolston v. Reader's Digest Assn., Inc., supra*, this Court observed that Wolston's conduct "attracted media attention", 443 U.S. at 167, noting that "at least seven news stories focusing on petitioner's failure to respond to the grand jury subpoena appeared in New York and Washington newspapers", *id.* at 162, and "[n]ewspapers also reported the details of the contempt proceedings and petitioner's guilty plea and sentencing", *id.* at 163. Although the Court concluded that Wolston was a private figure, it did not reject as hearsay the media reports concerning his activities.

D. There is no Right to a Jury Trial on Subsidiary Factual Issues Relating to Public Figure Status

Like any legal defense which is to be decided by the court, e.g., the statute of limitations or proper service of process, in reaching its legal conclusion the court necessarily makes certain factual determinations, even where specific factual questions may be disputed. The petitioner cites no authority to support his novel contention that every subsidiary factual dispute requires resolution by a jury. In fact, the courts that have addressed the question hold that the public figure determination presents a question of law. *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966). (See authorities cited at App. at 16 n.4).

In this case, the issue of fact, if any, was not the truth of petitioner's various activities in the drug culture, but the existence of numerous newspaper articles linking him with the Castle and the criminal activities that occurred there. Such

articles clearly existed whether or not their contents were accurate. Furthermore, there is nothing in the record to suggest that the Court of Appeals relied upon any material issue of disputed fact in order to arrive at its conclusion that Marcone was a limited purpose public figure.

II.

THE COURT OF APPEALS PUBLIC FIGURE ANALYSIS IS ENTIRELY CONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT

A. The Court of Appeals Did Not Rely Solely on Petitioner's Indictment to Find Him a Public Figure

In finding Marcone to be a public figure, the Court of Appeals was careful to stress the narrow ambit of its holding: "This decision is tied to the facts of this case." (App. at 27 n.11). The public figure holding resulted from "a mix of factors leading to that classification" (App. at 24) and only "when all the relevant factors are considered in context and as a whole" (App. at 26).

The Court of Appeals did not solely rely upon Marcone's 1976 indictment in a billion dollar drug trafficking ring to find him a public figure, but considered that fact as only one of several elements (App. at 24). Accordingly, the Court of Appeals did not act inconsistently with this Court's decisions in *Firestone* and *Wolston*, but instead recognized that alleged participation in criminal activity does not automatically make a libel plaintiff a limited purpose public figure. (App. at 23).

This Court has never prohibited consideration of an indictment as a factor to be evaluated in determining public figure status. The Court of Appeals did not accept the indictment as establishing the truth of the allegations therein, but instead pointed to it, and its attendant widespread publicity, as an example of the public attention attracted to Marcone in connection with drug smuggling—the very subject matter of the Penthouse article.

Rather than stressing the fact of Marcone's indictment, the Court of Appeals analyzed "the nature and extent of Marcone's participation in drug activities." (App. at 22). The Court of Appeals looked beyond the indictment to Marcone's close connections with the Castle, "a large mansion in Delaware County which served as the headquarters for the Pagans motorcycle gang" and which was linked with numerous illegal activities "including drugs, stolen goods, and the disappearance and suspected murder of five young women," to the relationship between "the Pagans and their illegal drug activities to the two billion dollar drug-smuggling ring brought to light by the Detroit indictment" (App. at 24), and to Marcone's meetings with the Pagans and other drug dealers at the gang's headquarters and his "going on occasional weekend trips with motorcycle gang members" (App. at 25).[3]

Furthermore, petitioner grossly overstates his case when he argues that when the Court of Appeals identified drug trafficking as the relevant public controversy for its public figure analysis, it "flouted the authority of this Court by intentionally deciding the point in direct conflict with this Court's decision in *Wolston*" (Petition, p. 14). There, this Court stated that "there was no public controversy or debate in 1958 about the desirability of permitting Soviet espionage in the United States;" 443 U.S. at 166 n.8, but instead referred to the public controversy "surrounding *the investigation* of Soviet espionage in the United States" *id.* at 166 (emphasis added). As the Court of Appeals concluded: "Drug trafficking of such mammoth proportions, which is one of the most troubling issues of our time, surely falls within the ambit of public controversy." (App. at 19). Although "all responsible United States citizens" oppose Soviet espionage, there is considerable debate concerning the legalization of marijuana as a solution to end illicit

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3 Evidence at trial indicated that Marcone had filed three libel lawsuits against the local newspapers which reported his illicit activities, claiming that the stories were false and defamatory; but Marcone insisted that he voluntarily allowed all three cases to terminate because they were not "viable".

smuggling. The Penthouse article was entitled "The Stoning of America," subtitled "Marijuana is now big agribusiness—a $12 billion a year corporate growth crop" and mentioned Frank Marcone as an example of the educated professional businessman or attorney who has taken over drug peddling from "the hippy dope-dealers of the 1960's counterculture" and who has been frustrating extensive governmental investigations by avoiding being sentenced to prison.

B. The Court of Appeals Did Not Hold that Petitioner's Representation of Clients Rendered Him a Limited Purpose Public Figure

As noted above, the Court of Appeals considered a "mix of factors" (App. at 24) in reaching the conclusion that Marcone was a public figure for the limited purpose of his connection with illicit drug trafficking. But one factor the Court of Appeals expressly downplayed was Marcone's representation of notorious hoodlums and drug dealers (App. at 24-25). The Court of Appeals stressed that it "may give only limited significance to Marcone's representational activities in the public figure analysis" (App. 25), and the context of its discussion on this point indicates that it was more concerned with addressing Penthouse's argument in order to deemphasize the significance of Marcone's activities as an attorney rather than to place any weight upon that factor in finding Marcone to be a public figure.

III.

THE FINDING OF NO MALICE BY THE COURT OF APPEALS WAS ENTIRELY CONSISTENT WITH THE DECISIONS OF THIS COURT AND THOSE OF OTHER CIRCUITS

The Court of Appeals independently reviewed the facts relating to the actual malice question, as required by this Court's decision in *Bose Corp. v. Consumers Union*, 104 S. Ct. 1949, 1965 (1984);

> "The requirement of independent appellate review reiterated in *New York Times v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common law heritage. It reflects a deeply held conviction that judges—and particularly members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice'."

The Court of Appeals correctly held that clear and convincing evidence of actual malice was lacking, and there was absolutely no proof to show that Penthouse "in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). To the contrary, the Court of Appeals found that Penthouse reasonably relied upon the reputation of the author, who was known to the Penthouse editors as a "very professional investigative

journalist" (App. at 32), upon "a copy of the Detroit indictment that charged Marcone with the crime for [sic] which the article stated he committed" (App. at 33-34), upon "an article from the *Philadelphia Inquirer*, dated March 18, 1976, which reported on Marcone's indictment" (App. at 34), and upon "a report of a hearing on illicit Mexican-American drug traffic before a Senate Subcommittee" (App. at 35). All of this research and verification was accomplished by Penthouse in connection with a fleeting reference to Marcone in two brief sentences of a 5000 word article, Marcone being only one of eight examples of attorneys involved in drug trafficking who escaped criminal sentences. The Court of Appeals stated that "based on an independent review of the record we conclude that the plaintiff failed to prove, either by clear and convincing evidence or even by a preponderance of the evidence, that the libelous statement was published with actual malice." (App. at 36-37). The legal question presented by petitioner as to whether all permissible inferences are to be resolved in his favor[4] during appellate review of the actual malice question simply does not arise in this case because even under petitioner's theory the evidence is constitutionally deficient to support a finding of actual malice.

The finding of no actual malice was not reached by viewing the evidence in the light most favorable to Penthouse, as erroneously urged at pp. 19-20 of petitioner's brief, and there is nothing in the opinion of the Court of Appeals to suggest that it undertook such an approach. Moreover, petitioner's argument that Penthouse failed to come forward with affirmative evidence explaining how the Senate Subcommittee footnote was misread[5] is an attempt to shift the burden of proving

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4 Petitoner cites *Tavoulareas v. The Washington Post Company*, 759 F.2d 90 (D.C. Cir., 1985), but on June 11, 1985 the Court of Appeals vacated its April 9, 1985 decision and granted the defendants' Petition for a Rehearing En Banc.

5 The Penthouse article stated that "[c]harges against him were dismissed because he cooperated with further investigations", whereas the actual footnote of the Senate Subcommittee report that applied to Marcone stated "[d]ismissed (to be reindicted in Philadelphia)."

actual malice by clear and convincing evidence away from the libel plaintiff and to unconstitutionally require the publisher to explain to the jury's satisfaction every aspect of the editorial and verification process upon penalty of punitive damages.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Dated: June 27, 1985

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1984

FRANK J. MARCONE,

Petitioner,

—*vs.*—

PENTHOUSE INTERNATIONAL, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT PURSUANT TO RULE 28

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Statement Pursuant to Rule 28.

The following is a list of subsidiaries and affiliates of Penthouse International, Ltd.:

Boardwalk Properties, Inc.
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Evelyn Rainbird, Ltd.
F D X Patent Holding Company N. V.
Follycons, Inc.
For Your Ears Only, Ltd.
Forum International, Inc.
Forum International, Ltd.
Minotaur Press, Ltd.
New Look Publications, Ltd.
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Tilley Marlieb Productions, Inc.
2201 Boardwalk, Inc.
U.S. Robots & Mechanical Men, Inc.
Variations Publishing International, Ltd.
Viva International, Ltd.
Berose Properties Limited
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Penthouse Travel Club Limited
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The Golden Door Limited
Grelstar Limited
Forum Publications Limited
Forum Press Limited
Evelyn Rainbird Limited
Apex Properties, Ltd.
FDX Associates, L.P.
Boardwalk Associates, Ltd.
Columbus Plaza Associates

No. 84-1869

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In The

Supreme Court of the United States

October Term, 1984

FRANK J. MARCONE,

Petitioner,

vs.

PENTHOUSE INTERNATIONAL, LTD.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No. 84-1869

In The

Supreme Court of the United States

October Term, 1984

FRANK J. MARCONE,

Petitioner,

vs.

PENTHOUSE INTERNATIONAL, LTD.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

I.

Contrary to respondent's argument, petitioner has not waived any issues which he has presented.

Respondent contends that petitioner has waived his hearsay, burden of proof and jury trial arguments. However, respondent's contention is totally without merit because the first time any of these issues arose in this case was in the Court of Appeals' opinion.

To support its argument as to waiver, respondent states that:

> In opposing Penthouse's motion for sumamry judgment before the District Court, Marcone never objected to the use of newspaper articles on the ground of hearsay (Resp. Br. 2)

This fact, however, has no bearing whatsoever on the issue of waiver because in offering the newspaper articles in support of its summary judgment motion, respondent expressly limited the articles' use to non-hearsay, stating:

> The newspaper articles presented to the Court on the summary judgment motion *are not offered to prove the truth of their contents,* but to demonstrate that Mr. Marcone has undeniably attracted a great deal of media attention. . . (Deft's. Reply Memo. in Sup. of Its Summary Judgment Motion, p. 10, D.C. Record, Item 24). (Emphasis added).

Thus, petitioner had no basis for a hearsay objection.

Respondent also argues that petitioner failed to complain about hearsay in the Court of Appeals. However, again, the respondent ignores the fact that hearsay was not an issue until the Court of Appeals rendered its opinion. At trial, the newspaper articles were admitted into evidence solely for the purpose of mitigating damages by attempting to show petitioner's pre-publication reputation and not for the truth of the matters asserted therein (N.T.4.77, Charge of the Court, 47).[1] Indeed, respondent

1. It is ironic that respondent has argued that petitioner has waived the right to complain about hearsay. Before this Court, respondent argues for the first time that the news articles were admissible on the issue of public figure status; at trial, however, they were offered and admitted solely for the purpose of mitigating damages by showing petitioner's pre-publication reputation.

expressly disclaimed any hearsay purpose in offering the news articles into evidence, by stating:

> Penthouse does not seek to introduce these news media articles into evidence for the *truth* of the statements contained therein (Penthouse's Trial Memo. of Law Supporting the Use of News Media Articles p. 3, D.C. Record, Item 29). (Emphasis in original).

As in the district court, respondent, in the Court of Appeals, did not rely on the newpaper articles for the truth of the matters contained therein. And respondent has maintained the same position in this Court[2] (Resp. Br. 5). Thus, there was no basis for petitioner to complain about hearsay at trial or in the Court of Appeals, and his failure to do so cannot constitute waiver.

Respondent also argues that petitioner waived the issues of burden of proof and right to jury trial by not raising those issues in the Court of Appeals. In fact, petitioner had no occasion to raise those issues until after the Court of Appeals decision. The district court had resolved the issue of public figure status in his favor and had not placed the burden of proof upon him and had not denied him his right to jury trial. In the Court of Appeals, respondent did not argue that the burden of proving public figure status was on petitioner and did not argue that there was any issue of fact regarding petitioner's status as a public figure. Thus, there was no basis for petitioner to raise these arguments in the district court or Court of Appeals.[3]

---

2. As is pointed out in Footnote 4 below, notwithstanding respondent's concession, the Court of Appeals relied heavily on the truth of the articles in finding petitioner to be a public figure.

3. Respondent makes the misleading statement that the district court "invited Penthouse to more fully develop the factual record at trial regarding

(Cont'd)

II.

Contrary to respondent's argument, the question of which party has the burden of proving public figure status has not been settled; and the Court of Appeals erroneously placed the burden of proving public figure status upon the petitioner.

In a vain attempt to avoid the issue, respondent agrees that the burden of proving public figure status is on a libel defendant. However, as petitioner has set forth in his petition, prominent commentators have stated that the burden of proof issue is an open question. *Restatement*, Torts 2d § 580A (1977); *Prosser & Keeton* on Torts, p. 806 (1984).

Moreover, contrary to respondent's argument, as the petition demonstrates, the Court of Appeals did place the burden of proving public figure status upon the petitioner. Respondent's characterization of petitioner's argument as simply being based upon petitioner's "interpretation" of the evidence is incorrect. Rather, it is based upon a plain reading of the Court of Appeals' opinion. Aside from making the conclusory statement that the

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(Cont'd)

the public figure issue" (Resp. Br. 2). Statements by respondent, the district court and the Court of Appeals contradict this. Petitioner's status as a public figure was not an issue *at trial*. Respondent's counsel, in his oral argument to the trial judge in support of his motion for a directed verdict at the close of all of petitioner's evidence stated "this Court has ruled that the plaintiff in this case is a private figure . . ." (N.T. 6.190). On the resjpondent's motion for summary judgment the district court determined that "Mr. Marcone is not a public figure for the limited purposes of this action" (533 F. Supp. at 360, App. 65-66). Respondent did not even argue the issue of whether petitioner was a public figure in its memorandum of law in support of its motion for judgment notwithstanding the verdict, or in the alternative for new trial (Item 64, U.S.D.C. record). On post-trial motions, the issue of petitioner's status as a public figure was, likewise, treated as having been determined by the summary judgment motion (517 F. Supp. at 322, App. 75). The Third Circuit also treated the issue as foreclosed prior to trial (754 F. 2d at 1077, App. 6).

Court of Appeals placed the burden of proof on the respondent, respondent fails to point out any language in the Court of Appeals' opinion which supports this argument.

III.

Contrary to respondent's argument, the Court of Appeals relied upon hearsay in holding that petitioner was a public figure.

Respondent erroneously asserts that petitioner has misread the Court of Appeals' opinion, and that the Court of Appeals did not rely upon newspaper articles for the truth of the matters asserted therein (Resp. Br. 4). The Court of Appeals' opinion refutes this,[4] as does another section of respondent's brief (Resp. Br. 7, ¶1).

Respondent also incorrectly argues that this Court's decision in *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979), approves the use of media reports to establish public figure status. The petition explains in detail that this Court has always considered whether plaintiff was in fact a public figure rather than whether he or she was merely reputed to be a public figure [Pet. 10-11, citing *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974)].

4. The Court of Appeals stated: "Marcone *reportedly* met at the Pagans' headquarters [the Castle] with Frey, Heron and Mealy. In addition, one *newspaper article reported* that Marcone admitted to going on occasional weekend trips with motorcycle gang members. For purposes of public figure analysis, we must look to Marcone's *actions* in addition to his intentions. . . . We find that Marcone's *voluntary connection* with motorcycle gangs — including his meetings at the Castle with Frey and his occasional weekend trips with them — in conjunction with the intense media attention he engendered is sufficient to render Marcone a public figure" . . .(App. 25-26). (Emphasis added.)

IV.

Contrary to respondent's argument, petitioner has a right to a jury trial on subsidiary issues of fact relating to the ultimate legal issue of public figure status.

Respondent's argument that there is no right to a jury trial on disputed subsidiary issues of fact relating to plaintiff's status as a public figure is based upon misstatements of fact and law.[5] Repsondent analogizes public figure status to the statute of limitations defense (Resp. Br. 5). According to respondent, the court, not the jury, decides disputed facts in determining the defense of the statute of limitations. This argument is legally incorrect. *O'Brien v. Eli Lilly Co.*, 668 F. 2d 704, 709 (3d Cir. 1981); *Bayles v. Phila. National League Club*, 579 F. 2d 37 (3rd Cir. 1978). The analogy to service of process is inapt because service of process, unlike the constitutional privilege in the instant case, is not a defense to a cause of action.

Respondent also argues that "the issue of fact, if any, was not the truth of petitioner's various activities . . . but the existence of numerous newspaper articles" (Resp. Br. 5). This statement, which is not supported by citation to any authority, is nothing more than respondent's view of the law. As the petition indicates, this Court has not, but should, settle the question of whether plaintiff's status as a public figure can be established by mere hearsay, such as newspaper articles. Moreover, respondent has demonstrated the fallacy of its own argument by quoting portions of the Court of Appeals' opinion in which the court relied upon the newspaper articles for the truth of the matters asserted therein, and not for the mere existence of the articles (Resp. Br. 7, ¶1).

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5. Petitioner has agreed that the ultimate question of whether a person is a public figure is a legal issue to be decided by the court.

Further, respondent erroneously argues that "there is nothing in the record to suggest that the Court of Appeals relied upon any material issue of disputed fact in order to arrive at its conclusion that Marcone was a limited purpose public figure" (Resp. Br. 6). This statement is untrue. The petition establishes otherwise (Pet. 11). As stated in the petition, the Court of Appeals considered as fact that petitioner had met various people at the Castle (757 F. 2d at 1086-87, App. 25-27). Petitioner, however, expressly denied having any connection with the Castle (N.T. 4.66). Petitioner could have rebutted other assertions in the newspaper articles, but had no reason to do so because his status as a public figure was not an issue at trial (*See* Footnote 2, *supra*).

V.

Contrary to respondent's argument, the Court of Appeals did not define the public controversy as the legalization of marijuana and the article had nothing to do with the legalization of marijuana.

The petition explains in detail how the Court of Appeals defined public controversy in direct conflict with this Court's decision in *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 166 n.8, 99 S. Ct. 2701, 2707 n.8, 61 L. Ed. 2d 450 (1979) (Pet. 13-15). In an effort to support the Court of Appeals' opinion, respondent mischaracterizes the pubic controversy as "legalization of marijuana" (Resp. Br. 7). The Court of Appeals, however, did not hold that the public controversy was the legalization of marijuana. This is not surprising because the article had nothing to do with the legalization of marijuana; it was about the details of the sale and distribution of marijuana.